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***435 ARBITRAL POWER AND THE LIMITS OF CONTRACT: THE NEW TRILOGY**

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The American law of arbitration has for some reason been replete with what we have become accustomed to call “trilogies”¹ - and the last two terms of the U.S. Supreme Court have curiously continued that pattern. Once again the Court has handed us three leading cases on closely related themes -- and these decisions have turned out in fact to be in many ways the most interesting of the lot. (I am referring of course to *Stolt-Nielsen*,² *Rent-A-Center*,³ and *Conception*.⁴) All three amount to extended riffs on the Question of Questions, the scope of arbitral power: And so the Court has continued to dip its finger into this rich mixture -- compounded of notions of judicial review, “arbitrability,” “separability,” *competence/compétence*, and the preemption of state law -- all of our hard-earned lore and learning is there.

Undoubtedly for the moment the greatest salience will be with respect to arbitration clauses in contracts of adhesion entered into by consumers and employees -- and yet this recent jurisprudence has the potential of sweeping far more broadly. It seems reasonably clear that these cases will continue to generate endless discussion. God knows that alone would be sinister enough, but the troubling implications don’t quite stop there. Things now seem curiously muddled: If our law of arbitration now no longer seems to have any clear unifying theme, any *fil conducteur*, this suggests that private adjudication -- rather than presenting us as it once did with a coherent and self-contained body of doctrine -- has become a hostage to a game played out on a larger stage, a pawn of wider, systemic “political” concerns. And so -- yet another untoward result -- these cases will require the reevaluation of what seemed, for a while, to constitute comfortably settled certainties. Here is at least one step in that direction.

***436 I. STOLT-NIELSEN: CONSTRUCTION AND “SILENCE”**

“It’s not the notes that you play, it’s the notes that you don’t play.”⁵

A. *Green Tree Financial Corp. v. Bazzle*

Let’s glance back for a moment at a previous “trilogy,” the product of the Court’s October 2002 Term. This provides us with a baseline for further discussion: In *Howsam*,⁶ *Bazzle*,⁷ and *Pacificare*,⁸ the Court seemed consistently to lay down a sweeping presumption with regard to arbitral competence; the common threads that run through all these opinions should be bright enough to illuminate matters even for the most distracted of readers:⁹

- The particular obstacles to arbitration that were raised in these cases --
 - a time limit (under NASD rules) for asserting claims;
 - an apparent waiver of treble damages; or
 - the legitimacy of class-wide proceedings --
- might all plausibly have been thought to limit the decision-making authority of the arbitrators: Each might be thought to raise

a question as to the parties' unconditional willingness to submit to the process -- and thus, in some sense, to implicate the contractual "jurisdiction" of the arbitrators.¹⁰ If so, then it might be thought to follow that it must be for a *court* to clear away the obstacles -- and to establish the existence of consent -- before any arbitration may be allowed to proceed.¹¹

- Nevertheless in each case the Court chose to conceptualize matters very differently indeed: Whether the contractual time limit had passed; whether the contract indicated an intention to waive the right to treble damages, or whether the parties had manifested a willingness to engage in class-wide *437 arbitration -- each question was seen as a matter of contract interpretation that the arbitrators themselves would be particularly well-placed to address. And each was treated as a discrete controversy that -- just like any other dispute between the parties going more conventionally to the "merits" -- the parties were presumed to have wished to submit to arbitration.¹²

- In each case a finding of contractual consent to arbitral decision-making rested on little more than an *a priori* assertion about what parties to an arbitration contract "would normally expect,"¹³ coupled with an invocation of the contract's "sweeping language concerning the scope of the questions committed to arbitration."¹⁴ These claims with respect to party expectations might also be buttressed by invoking the supposed comparative advantage of institutional arbitrators, deemed "comparatively more expert about the meaning of their own rules" -- for the law should "assume an expectation that aligns decisionmaker with comparative expertise."¹⁵

Now *Bazze* is of course the case where the legitimacy of class-wide arbitration was first brought into play; it thus deserves a particularly close look. It is important at the outset to take a step back and to be sure we know what was going on there, in order to have some sense of where *Stolt-Nielsen* fits into the picture: And a case can only be understood -- not through its recital of abstract *438 principles suitable for highlighting with a Magic Marker -- but through the dialectic of the argument.

1. Justice Breyer began his opinion in *Bazze* by posing the question, are the contracts between the parties in this case "*silent, or do they forbid class arbitration?*"¹⁶

This is not an inevitable formulation -- and so it may be useful to consider for a moment, why the Court's choice was framed in precisely that way. Here is what happened:

In the courts below the South Carolina Supreme Court, in confirming a hefty class award,¹⁷ had first found that the parties' agreement "was *silent* regarding class-wide arbitration"; it then asked whether in such circumstances of "silence" "class-wide arbitration is permissible."¹⁸

Now "silence," as I hope we will see, is a curious and unorthodox and unhelpful construct. Presumably the court meant to suggest nothing more than that the contractual text itself contained no particular semantic "hook" on which meaning could be hung -- or perhaps, that no definitive meaning could be derived from the contractual text alone. Of course, if this were all there was to "silence," it would be the most trivial of preliminary steps -- for it would be an impoverished view indeed of the interpretive enterprise to suppose that one could sensibly stop there; surely some sense of context, and some sort of purposive narrative, are necessary to tease out the parties' "framework of common understanding."¹⁹ Once content with its finding of "silence," however -- once it was satisfied the text said nothing -- the South Carolina court did not pursue any further interpretative path. But it did not fail to perceive the need for what we would call "construction": So the lower court orders compelling class-wide arbitration were affirmed on the ground

- that "ambiguous" language must be construed against the drafter;²⁰ and more fundamentally, on the ground

- of what appears to be a state-created default rule crafted for circumstances of "silence": In such cases, the court held, class-wide proceedings are permissible merely on the condition that they "would serve efficiency and equity, and would not result in prejudice."²¹

Both the threshold assessment of "silence" -- and then, the implications in terms of whether a class-wide proceeding was nonetheless "permissible" -- were assumed to be matters of state law: Federal law was brushed aside as inapplicable,²² and no thought whatever was apparently given to the question whether all of this might have been a matter for the arbitrators themselves.

On the other hand, in the view of the respondent, it was inappropriate even to go down the path of fashioning these rules of construction: This is because for the respondent, the agreements between the parties were not “silent” at all -- since a fair reading of the text would lead to the conclusion that by their terms they in fact *barred* any class-wide proceedings.²³

So this is the procedural posture in which the case came to the Supreme Court, and Justice Breyer’s formulation neatly encapsulates the contending approaches --

*440 • on the one hand, a state-law default rule crafted to supplement a supposed textual indeterminacy;

• and on the other, the respondent’s claim rooted in a supposed textual prohibition.

Obviously, though, to pose the question in this way -- does the agreement “forbid class arbitration,” or is it merely “silent”? -- is inevitably to sow the seeds of future confusion. Eager claimants²⁴ and receptive arbitrators²⁵ would take up this frame in an unguarded and uncritical fashion; distinguished commentators too would come to speak as if Justice Breyer had somehow loaded the dice -- as if the Court had wished to privilege class-wide arbitration to the extent that a reluctant party was required to affirmatively demonstrate that the parties had manifested an intent to *exclude* it.²⁶ But there is nothing whatever in Justice Breyer’s statement of the problem -- responsive, as we have seen, to the dialectic of party argument -- that could justify any such assumption: A presumption to that effect may indeed have been the state-fashioned default rule in South Carolina -- which is all that was at stake in *Bazzle* itself. But this says nothing whatever about alternative background rules that might be preferred in litigation in other states,²⁷ or about *441 the possible existence of a federal default rule, or -- still less -- about what would be a permissible uniform working rule for an arbitral tribunal.

2. In the event the question posed by Justice Breyer in *Bazzle* -- now that we know where it came from -- remained unanswered.

Writing for a plurality of four justices, Justice Breyer pointed out that whether the respondent was right in its textual argument “presents a disputed issue of contract interpretation”: It was a dispute about what the contract “means (i.e. whether it forbids the use of class arbitration procedures)” and was thus, within the language of the arbitration clause, a dispute “relating to this contract.” Consistent with the other cases in the “trilogy,” this was therefore not a matter for the courts -- whether state or federal -- but “for the arbitrator to decide.”²⁸ While the arbitrators, in going on to administer class-wide proceedings, may have acquiesced in the reading of the contract by the state courts, nevertheless the parties still had not “obtained the arbitration decision that their contracts foresee”; the state-court judgment was therefore vacated and the case remanded “so that the arbitrator may decide the question of contract interpretation.”²⁹

Justice Breyer thus fashioned a rule by which:

• Under the federal common law of arbitration, this question -- which went not to whether the parties had ever “*agreed to arbitrate a matter*,” but rather to “*what kind of arbitration proceeding*” they had agreed to³⁰ -- is presumptively a question for the arbitrators themselves. The court finds a delegation of decision-making power directly from the parties to the arbitrators that instructs them to determine whether the agreement permits class-wide proceedings. It is striking that Justice Breyer reached out for this formula -- as far as I can tell -- with no particular urging from either party.³¹

*442 • And under this common law the presumption of arbitral competence is binding on state courts. (A dissenting opinion, written by Chief Justice Rehnquist, at least agreed with Justice Breyer that the allocation of decision-making authority was preemptively a matter of federal law.)³²

Note that despite the way he framed the issue at the outset, the whole trope of “silence” seemed to play little or no role in Justice Breyer’s decision: His plurality opinion delegated to the arbitrator the entire “question of contract *443 interpretation” -- that is, how the contract should be read. Understood sympathetically, and with an eye to arbitration practice, this should encompass at the same time,

• a semantic inquiry into the literal words of the text -- if any;

- an appreciation of circumstance and context, the “customs and practices which the parties have come to consider as settled patterns of conduct,”³³ -- all going to make up what was their “bargain in fact”;³⁴ and, as well,
 - the work of construction to determine what the text should be taken to “mean” -- that is, its legal effect.
- In resolving disputes over “meaning,” no decision-maker -- not an arbitrator, and not the South Carolina Supreme Court, nor any common-law court -- could be *444 expected to divorce any of these from the others: All are within the sovereign appreciation of a “contract reader.”³⁵

And so,

- should the arbitrators conclude that class-wide proceedings were indeed permissible, the result would presumably be the same as that mandated by the South Carolina courts -- remand would otherwise have been largely futile.³⁶
- In the (virtually unimaginable) eventuality that the arbitrators should conclude that a proper construction of the agreement *forbids* class-wide arbitration, the result would presumably be to the contrary.³⁷

3. The implications of *Bazzle*.

In a separate opinion, Justice Stevens wrote that in his view, “nothing in the [FAA] preclude[d]” what the South Carolina courts had done.³⁸ The state courts’ *445 order to proceed on a class-wide basis was therefore “correct as a matter of law” -- and since in any event the respondent had never claimed that the decision had been made by the wrong decision-maker, he thought it would be “simpler” merely to affirm. But there was certainly no majority for affirmance, and so to avoid the lack of any judgment at all, Justice Stevens expressed willingness to concur in the result. After all, he added -- conceding the essential point -- “arguably the interpretation of the parties’ agreement should have been made in the first instance by the arbitrator, rather than the court”; as a consequence “Justice Breyer’s opinion expresses a view of the case close to my own.”³⁹

Now to say that the choice to defer to the arbitrator was “arguable,” and a view “close to my own,” is hardly equivalent to an endorsement -- and the lack of any rationale commanding a majority of the Court naturally created some little uncertainty with respect to the strength of *Bazzle* as precedent.⁴⁰ But whether ordered by a court or by the arbitrator, there was in any event clearly a majority for the proposition that on facts similar to those in *Bazzle* -- circumstances of apparent “silence” -- the FAA *did not foreclose a determination by somebody* that class-wide proceedings were permissible. This is a fortiori the case for Justice Stevens, who was after all content to rely, without more, on the application by state courts of their own default rule.

So despite the ambiguities introduced by this separate opinion, *Bazzle* was immediately taken to be an endorsement by the Court of a new norm of class-wide arbitrations.⁴¹ Just four or five months after *Bazzle* was handed down, the AAA -- in order to “prepare for an anticipated increase in demand for the administration of class arbitrations”⁴² -- published a set of “Supplementary Rules” for class-wide *446 proceedings; these mirror in many respects Rule 23 of the Federal Rules, and create an elaborate framework for arbitral determinations of the sort envisaged by Justice Breyer.⁴³ There is first to be an arbitral determination, “as a threshold matter,” on the “construction” of the arbitration clause -- to determine whether it permits the arbitration to proceed on behalf of a class. A party may move to confirm or vacate this “clause construction award,” and after a stay for the purpose of seeking judicial review, the arbitrators are then to proceed to determine the question of class certification -- that is, whether the case “*should* proceed as a class arbitration.”⁴⁴

*447 The vast potential exposure of respondents in class-wide proceedings -- before eager and enterprising arbitrators whose decisions will be effectively final -- made resistance to all of this inevitable. At oral argument in *Bazzle*, Justice Stevens plaintively inquired, “does this case have any future significance, because isn’t it fairly clear that all the arbitration agreements in the future will prohibit class actions?”⁴⁵ That of course is a question the Court would need to explore further in *Conception*. A somewhat more baroque technique of avoidance is represented by the decision in *Stolt-Nielsen*, which soon followed, and to which we now turn. In light of all these developments, are we not compelled to see *Bazzle* as nothing but a well-meaning but now largely irrelevant frolic?

B. Stolt-Nielsen S.A. v. AnimalFeeds International Corp.

A number of charterers had brought antitrust suits against a shipping company, each purportedly on behalf of a class, and later consolidated. The respondent had successfully moved to compel arbitration, and the claimants then demanded a class-wide arbitration proceeding. At that point, “in light of *Bazze*,”⁴⁸ the parties entered into an agreement stating that the arbitrators “shall follow and be bound by” the AAA’s Supplementary Rules for Class Arbitrations; an arbitral tribunal was empanelled under those rules to render a “clause construction award.” You will note immediately that this agreement of the parties rendered the jurisdictional holding of *Bazze* largely irrelevant.⁴⁹ We have here an express grant of power to the arbitrators that replaces the presumed allocation, found by the plurality in *Bazze* to be implicit in the arbitral enterprise.

The arbitrators then went on to conclude that the arbitration clause did indeed authorize class-wide arbitration.⁴⁸ The respondents sought to have this “clause *448 construction award” vacated, and were successful in the district court.⁴⁹ In the lower courts the case proceeded much along the lines you might expect: The district court rested vacatur on a finding that the tribunal had “manifestly *449 disregarded a well defined rule of governing maritime law.”⁵⁰ The Second Circuit -- after a “pause” to consider the profoundly uninteresting question whether “manifest disregard” had even survived the *Hall Street* decision⁵¹ -- reversed; in a most conventional analysis, it concluded that an arbitrator’s “misapplication” of a contract’s terms can hardly “rise to the stature of ‘manifest disregard’” -- since “interpretation” is “an area we are particularly loath to disturb” -- and that determinations of custom and usage, informing any reading of a contract, are themselves in any event “findings of fact” wholly immune to review on “‘manifest disregard’ grounds.”⁵²

Now one would have thought that the next step could have been predicted with some confidence. The Court in *Bazze* -- after remanding for an arbitral exercise in construction -- had seen no need to go further: That is, it saw no need to address what standards the arbitrators would be expected to use, or what sort of decision (if any) the FAA might require, or what level of scrutiny a court would *450 be expected to deploy. But answers to all of these questions might reasonably have seemed implicit in the holding:

- Perhaps the availability of class-wide proceedings might be considered to be a critical question of arbitral “jurisdiction”: That is, it is at least marginally conceivable that the question could be taken to implicate to some degree the very existence or validity of consent to the arbitration process.⁵³ *Bazze* of course suggests otherwise. But even if this is the case, the teaching of *First Options* would nevertheless remain with us -- reminding us that *the parties may reallocate, to the arbitrators themselves*, what would otherwise be a matter for judicial determination. If this kind of inquiry were necessary in *Stolt-Nielsen*, we could readily conclude that such a reallocation was *precisely the effect of the parties’ express submission to the AAA rules*.⁵⁴ And if we are satisfied that they have in fact done so, then we would expect an arbitral award on the subject to command precisely the same degree of deference as would *any* decision “on the merits” resolving a dispute submitted by contract to the tribunal.⁵⁵

*451 • By contrast, as we have seen, the plurality in *Bazze* pretty clearly took the opposite view -- the view, consistent with other cases in the 2002-2003 “trilogy,” that the availability of class-wide proceedings does not even rise to the level of such a “gateway” issue.⁵⁶ But in that case, precisely the same result would be indicated -- indeed, if anything more strongly still. For what can we possibly mean when we say that an issue is not one of “arbitrability”? Only this: that we are willing, *at the very outset*, to *presume* that the parties have consented to entrust it to the arbitrators, without any need for an express reallocation.⁵⁷

*452 The former view, following the Court’s decision in *Stolt-Nielsen*, may now in fact be the new dispensation -- but that in itself, as we have seen, does not necessarily say anything about the scope of review after an award has been rendered.

Nevertheless the Supreme Court reversed and held that the award should have been vacated:

1. Instead of making some “determination regarding the parties’ intent”⁵⁸ -- and instead of “identifying and applying a rule of decision” derived from state or federal law⁵⁹ -- the arbitral tribunal had merely “imposed its view of sound policy”⁶⁰ -- and by doing so, had “exceeded its powers” under §10(a)(4).⁶¹

2. Nor was there any reason, after vacatur, to remand and “direct a rehearing by the arbitrators” under §10 (b) -- that would be pointless because “there can be only one possible outcome on the facts before us”: Since there was no “contractual basis”

to support a finding of consent to class-wide proceedings, the parties “cannot be compelled” to participate in one.⁶²

Since the parties’ independent submission to AAA rules meant that the holding in *Bazzle* was not directly implicated, a simple overruling in *Stolt-Nielsen* would have been difficult -- and perhaps, given the passage of only a few years, ***453** unseemly.⁶³ So if the tension with the traditional “private” model of informal dispute resolution seemed too great -- and if the inevitable second thoughts, and changes in the composition of the Court,⁶⁴ seemed to call for the process to be ***454** reined in -- then there remained only this clumsy and intrusive “second look” at the arbitrators’ exercise of judgment. Nevertheless there is much that is difficult to understand in the Court’s methodology, if methodology there is, and the implications are troubling. Perhaps I can attain greater clarity by unpacking the holding, dividing the discussion into two parts, roughly following the headings above.

1. “A Determination Regarding the Parties’ Intent”

“I used to teach Contracts, did you know that?”⁶⁵

Now if a claimant is demanding that a court -- or an arbitral tribunal -- order “his” arbitration to proceed on a class-wide basis, what is the route to such a conclusion: What is the link between the demand and the order?

What is clearly the appropriate starting point is some sort of finding to the effect that this would be consistent with the agreement of the parties.⁶⁶ The “threshold” inquiry mandated by the AAA’s “Supplementary Rules for Class Arbitration” is whether the arbitration clause “permits the arbitration to proceed on behalf of” a class.⁶⁷ At oral argument Justice Scalia complained that this “doesn’t help me a lot. What does it mean, ‘if it permits it’? ... [D]oes that mean ***455** whether the parties have agreed to it?”⁶⁸ At the risk of getting a little ahead of myself, I will suggest that the proper answer to his question would have been this: The Rules simply envisage a “level 2” inquiry⁶⁹ into, “*whether the ability to order class-wide proceedings is within the scope of the powers granted by the parties to the arbitrators?*”

Before the arbitral tribunal, the parties in *Stolt-Nielsen* had apparently agreed that the arbitration clause said nothing particularly explicit on the issue of class-wide proceedings -- but that it was instead “silent.”⁷⁰ Before the case was over this trope of “silence” had come to mean something rather more than it did in *Bazzle*⁷¹ -- but that such an offhand remark would ultimately assume such an outsized and outlandish importance, must have been something of a surprise to everyone.

At the outset, summoning up the notion of “silence” seemed to be little more than a rhetorical shorthand: For the claimant, “*because the arbitration clauses were silent, arbitration on behalf of a class could proceed.*”⁷² Recall that Justice Breyer framed the problem faced by the Court in *Bazzle* as a choice between two “contending approaches” -- between, on the one hand, a state law default rule deployed in the event of textual indeterminacy, and on the other hand, “the respondent’s claim rooted in a supposed textual prohibition.”⁷³ The claimant’s obvious intent was to invoke this dichotomy -- and in doing so to point out his preferred alternative: To eliminate the latter prong -- there could be no prohibition “*because the arbitration clauses were silent*” -- would, it was hoped, necessarily open the door to choosing the former -- that is, it would permit an arbitral choice of a default rule that would operate in his favor. For the respondent, by contrast, “*because the arbitration clauses were silent, the parties intended not to permit class arbitration.*”⁷⁴ The obvious purpose here was to invoke the many cases that, over the years, tended to assume -- again, in the absence of some explicit authorization -- that federal courts lack any power to order the consolidation of related arbitrations.⁷⁵ Reliance on this federal background law would, supposedly, ***456** explain and justify the lack of any more precise provision with respect to class proceedings.⁷⁶

So the conceit of “silence” could not have been meant to carry much beyond the usefulness of such a frame in the dialectic of the argument.⁷⁷ Nor did any supposed agreement along those lines prevent the parties from engaging in sustained argument, both semantic and otherwise, with respect to what their “true intention” had been -- a reading of the briefs and the transcript of the oral argument hardly suggests that they thought this question of interpretation had been stipulated away.⁷⁸ And neither the district court nor the court of appeals ***457** made the slightest reference to it below: Indeed the entire thrust of the Second Circuit’s decision was deference to the arbitrators’ own exercise in “interpretation” and to their “findings of fact,” finding their reading of the agreement to be “at least colorable.”⁷⁹

Nevertheless the Supreme Court took this putative stipulation and -- with no particular urging from anyone -- ran away with

it. The claimant had in fact conceded that “when a contract is silent on an issue there’s been no agreement that has been reached on that issue.”⁸⁰ For the Court, this did not suggest merely that there had been no “express reference” to class-wide proceedings -- it implied as well that the parties had had no understanding with respect to the matter whatever -- that is, that there had been no “meeting of the minds” at all.⁸¹

And what are the implications of *that*, exactly?

- Well, to begin with, there is this: Perhaps the arbitral award did actually purport to rest on the parties’ contractual language and intent.⁸² But for Justice Alito, it had been entirely illegitimate for the arbitrators even to begin to go down that path -- for the parties’ “stipulation” had necessarily barred, at the outset, all the traditional routes to contractual interpretation: ***458** The arbitral tribunal had “had no occasion to ‘ascertain the parties’ intention’ ... because the parties were in complete agreement regarding their intent”; “any inquiry into that settled question would have been outside the [tribunal’s] assigned task,” and even the wording of the agreement itself “was quite beside the point.”⁸³ All that could be left, then, was not “interpretation” but the tribunal’s own idiosyncratic “policy choice.”

- Yet another, and even more striking, implication was to surface later in the opinion. As we shall see, this is a critical move sweeping far more broadly than mere criticism of the way in which the award was drafted: Apparently the “stipulation” that there had been “no agreement” with respect to class-wide arbitration, meant that *any* arbitral order -- however arrived at -- would necessarily be at odds with the “contractual basis” of arbitration: For “the parties cannot be compelled to submit their dispute to class arbitration” *without their consent* -- and a stipulated lack of “agreement” must mean precisely that the requisite affirmative showing of “consent” had not been made: The “stipulation” had thus deprived the arbitral order of the requisite “contractual basis.”⁸⁴

Perhaps we should pause for a moment to consider just what role the parties’ supposed “stipulation” played in the ultimate result in *Stolt-Nielsen*. Consider, for example, what might be expected to happen in the future -- in a lower court

- which has been presented with a case that seems identical to *Stolt-Nielsen* in every respect,
- but where there has been no comparable concession by the claimant with respect to a “lack of agreement” -- no concession, that is, that can be seized upon and exploited,
- and yet where both parties are making the same and inevitable arguments with respect to the text of the arbitration agreement -- an agreement conventionally drafted, and necessarily indeterminate on the subject of class-wide proceedings.

Might this scenario open up an interpretive path leading to class arbitration, a path down which receptive arbitrators remain free to stroll?⁸⁵ I suppose that an ***459** answer of “yes” is faintly plausible: Indeed it has been asserted that since the *Stolt-Nielsen* holding “was based” on this supposed “stipulation” -- but since “in the future [no] party in the position of AnimalFeeds [is] going to agree to” it -- then the case will in fact do nothing much to impede the growth of class-wide arbitrations.⁸⁶

I agree that it would be tempting indeed to deploy this argument as a limiting device, in the interest of cabining the reach of the Court’s decision. But I confess to being somewhat skeptical -- since I suspect that the mere failure to locate any ***460** “stipulation” with respect to “silence” (coupled with the canonical “broad” clause⁸⁷) is unlikely to provide any stable equilibrium for understanding and applying the Court’s holding. Any such “stipulation” was, as we have seen, largely fictive anyway, and everything the Court says about it reeks of disingenuousness; it seemed to operate here largely as a trap for the unwary claimant, who could hardly have imagined that he was conceding the very question of interpretation on which his case rested. More thoughtful observers have tried to remain true to the spirit of *Stolt-Nielsen* by preferring to believe that the text alone, even in the absence of any “stipulation,” will not be adequate to justify an order of class-wide proceedings.⁸⁸ Still, such a technique of avoidance is readily to hand,⁸⁹ and the Court may come to regret that it did not draft its opinion more broadly.

***461** In any event Justice Alito’s reaching out to attribute significance to some supposed “stipulation” is telling -- because it illustrates, I think, precisely where the Court went astray. The critical flaw lies in the limits that *Stolt-Nielsen* independently imposes on the process of contract construction when carried on by an arbitral tribunal.

Now the very concept of “silence” in a contract -- or of a “lack of agreement,” or of a “failure of a meeting of the minds” -- is problematical and somewhat naive: “Indeed, by its legal definition a ‘contract’ *cannot* be incomplete.”⁹⁰ Or as Justice Breyer put it during oral argument, “when you interpret a contract and it doesn’t say, you try to figure it out.”⁹¹

There is of course a necessary qualification lurking in the preceding paragraph -- I guess I need to signal my awareness of it, although it really doesn’t seem particularly relevant here. A “gap” -- whether

- created by misunderstanding (that is, by an unsuspected latent ambiguity);

- or by a “draftsman’s blind spot” hidden by unconscious assumptions;⁹²

- or simply by a conscious preference to let sleeping dogs lie and to “agree” at a later date⁹³--

*462 may turn out to be fatal to any finding that the parties had bound themselves to *any enforceable obligation at all*: The “gap,” that is, may be so extensive as to “swallow” whatever has actually been agreed on. The result would be that there is “no contract.” But for this to come into play, the area of non-agreement would have to be considerably broader, and closer to “the bounds of the entire consensual perimeter,” than was the case in *Stolt-Nielsen*.⁹⁴

If the text gives no reliable basis from which to divine intent one way or the other,⁹⁵ then whoever is construing the contract will begin by trying to tease out what the parties wished to do, through recourse to the usual extrinsic methods for determining the content of the “bargain in fact.”⁹⁶ But should we become satisfied that the parties have really “failed to manifest any type of inferable assent” with respect to a particular question,⁹⁷ then the work of giving “meaning” to the contract hardly ends -- really, it is just barely getting underway.

An obvious, but modest, start is to look at the structure and purpose of the agreement, inquiring into the solution that would be most congruent with the *463 “overall objectives of the parties.”⁹⁸ Once we can identify the “sense of the transaction” -- what the parties were about, and what they were trying to do -- the question whether there has been a true “meeting of the minds” may begin to seem somewhat arid and abstract: Indefiniteness can often be cured by little more than an exercise of practical wisdom, striving to give content to the agreement by ensuring the “business efficacy” that the parties “must have intended” the transaction should have.⁹⁹

A further step -- barely perceptible as anything different from what has gone before -- would ask us to move from “interpretation” as commonly understood to the process of filling a gap in a responsible way. The law of Contracts is of course rife with “gap fillers” -- it is rather hard to see how we could function without them -- and much of the UCC in fact consists of presumptions to which we necessarily default in reading an agreement, where the parties have given us no particular indications to the contrary.¹⁰⁰ The most common tactic is to adopt a “mimicking” principle which seeks to align what the court does with a hypothetical consent -- hence the phrase “implied terms.” The search is for those terms “the parties would have agreed upon”¹⁰¹ in a completely spelled-out *464 agreement -- or perhaps, for the “bargain that most similarly situated parties would have chosen, or that it would be rational for such parties to have chosen *ex ante*.”¹⁰²

I say this is a “barely perceptible” step because quite often, it is not acknowledged -- or perhaps even realized -- that a conscious choice of a default rule is being made.¹⁰³ Conventional commentary may insist on a doctrinal separation between mere questions of “interpretation” -- necessarily focused on the search for the appropriate “intent” -- and exercises in “gap filling”¹⁰⁴ -- but after all, this is nothing but a matter of degree,¹⁰⁵ and conceptualism should not prevent us from appreciating that “gap filling” is equally “interpretive,” precisely to the extent that it represents an effort “to determine how the parties would have resolved the issue that has arisen had they foreseen it when they negotiated their contract.”¹⁰⁶ Conversely, given that there is often no true “intention” one way or the other, courts in a sense “make” contracts for the parties “almost every time they resolve an issue of contract interpretation” under the guise of deciphering the *465 text.¹⁰⁷ Both ambiguous and omitted terms can be recharacterized simply as terms that have failed to “fully specify obligations.”¹⁰⁸

From here there is often one further, small, but significant step. A default rule that purports to mimic a hypothetical transaction may not after all make a great deal of sense once one concedes that really, there has been no agreement whatever with respect to the missing term.¹⁰⁹ As a consequence courts may think it best to bypass the exercise entirely -- foregoing any

pretense of conjecture about the bargaining process, or any attempt to reconstruct what the parties “would have chosen” -- in favor of bringing to the surface what was probably latent all along: They may, in other words, proceed directly to select the solution which appears most economically efficient, or perhaps proceed to apply “a term which comports with community standards of fairness and policy.”¹¹⁰ We can be pretty confident *466 that a bluff and straightforward attempt to “supply” a term which is simply “reasonable in the circumstances”¹¹¹ is not likely to stray too far from what at the very least were the tacit assumptions of the contracting parties underlying the deal.”¹¹² But in any event normative concerns will ineluctably play a role here, and a court which has no particular interest in camouflaging the route to its conclusion may well appeal to them explicitly.¹¹³ Any number of default rules in our law of arbitration can be understood in this way.¹¹⁴

*467 Having reached this point, we pause and look around and find ourselves pretty clearly in the realm of “construction” rather than “interpretation.” But it has never been thought that a court was foreclosed from going down this path; in all the cases I have mentioned there is a “gap” in the simple and straightforward sense that a conceded “contract” has failed to specify a result in all possible future states of the world. So, at just what moment -- just where in this gradual series of moves -- are *arbitrators* now to be told to stop and to go no further?

Skepticism about the coherence and stability of any supposed dichotomy between “construction” and “interpretation” seems in fact to be both justified and growing -- whether it involves reading a will,¹¹⁵ or even a constitution.¹¹⁶ With respect to the reading of a contract -- our particular concern -- the two are routinely conflated.¹¹⁷

At most, perhaps, one might stake out some relevance for the distinction in the claim that “construction” (alone) is to be deemed a matter of “law” -- if only in the precise sense that exercises in “construction” (alone), when engaged in by lower *468 courts, are to be subject to a heightened standard of review on appeal.¹¹⁸ However doubtful we must be as to whether any of this is particularly manageable -- in disputes that turn on the meaning of a contract, questions of “fact” and “law” will be after all “inextricably intertwined”¹¹⁹ -- it is very hard to see any purchase at all for such a notion in the context of attempts to vacate an award. The critical point is that an arbitration agreement makes arbitral tribunals plenary judges of fact and law without any sort of review remotely reminiscent of that exercised over a hierarchically inferior court.¹²⁰ The very fact that Americans (alone in the world) have to live with the civil jury -- which after all sets the gold standard for unprincipled decision-making -- may perhaps explain why we can be so tolerant of, and comfortable with, departures from legal norms in an arbitral process to which the parties have voluntarily submitted. For well over a century the cases have been full of reminders to the effect that “if an arbitrator makes a mistake either as to law or fact, it is the misfortune of the party and there is no help for it.”¹²¹

So when the Court

- purports, somewhat disingenuously, to notice a supposed “stipulation” respecting a failure of “agreement” -- and then
- chooses to draw the line right there -- allowing a tribunal to go no further, on the ground that doing anything more would be to “impose its own conception of sound policy”¹²² --
- *469 it is cabining our law of arbitration within an extraordinarily cramped view of adjudication.
- For one thing, as we have just seen, *no* “contract reader” operates this way.¹²³
- For another, it is entirely ahistorical to insist on a constricted authority -- not on the part of a lower court, but of an arbitral tribunal set in motion as the agent of the contracting parties -- to fill gaps in an incomplete “non-agreement.”¹²⁴

For my money, then, the most mystifying sentence to be found in any opinion ever written by the Supreme Court on the subject of arbitration, is this line of Justice Alito’s in *Stolt-Nielsen*: The award must be vacated, he writes, because “the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.”¹²⁵ If the arbitral decision-maker is really instructed to stop well short of the usual judicial work of construction, it becomes difficult indeed to claim that *Stolt-Nielsen* calls for “the same type of interpretative analysis that has always been used” in determining the existence of consent in multiparty cases.¹²⁶

*470 Now what the Court was getting at in *Stolt-Nielsen* is not, at a high level of generality, entirely novel. When the

majority wrote that the arbitral tribunal had “exceeded its powers” by simply “impos[ing] its view of sound policy,”¹²⁷ this was hardly intended to suggest that arbitrators may no longer adjudicate claims implicating the “public interest” -- for arbitrators may and indeed must decide questions of mandatory law in fidelity to the choice of the parties to entrust such matters to them.¹²⁸ Nor, when the majority reminds us that arbitrators may not “dispense [their] own brand of industrial justice,” could it be thought that it was suddenly reaching out to appropriate some alien doctrine of review peculiar to our collective bargaining jurisprudence.¹²⁹ No, I would think that what the Court was *471 trying to say was undoubtedly much simpler: It seems that the intention was merely to invoke a conventional trope that has long been familiar to our law of arbitration -- to the effect that what will provoke vacatur, is the arbitrator’s frolic, his “flights of fancy”¹³⁰ -- for this and only this “lies outside the perimeter of agreement.” The “critical distinction” then has always been “between the arbitrators’ imperfect ability to carry out the task entrusted to them, and their simple failure even to try.”¹³¹ That the award must in this sense “draw its essence” from the parties’ agreement may seem a curious formulation, but it is also curiously satisfying, and manages to get the idea across quite adequately: And this is really all that “excess of power” (or “manifest disregard,” for that matter) comes down to.¹³²

*472 But mere adjudication in the face of a lack of agreement is not at all tantamount to proscribed “faithlessness” -- not as long as it remains within the authority of the parties’ chosen arbitrators to devise appropriate default rules to help them construe the contract. It is only a failure to proceed as instructed¹³³ -- or the defiance of some contractual mandate¹³⁴ -- perhaps indeed to the point of saying, “to hell with” the applicable law¹³⁵ -- that begins to endanger the paramount value of private autonomy.

We have already noted the *Stolt-Nielsen* Court’s extraordinary rebuke of the arbitral tribunal for having “proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule.”¹³⁶ In the very same sentence, the Court faulted the tribunal for failing to “[inquire] whether the FAA, maritime law, or New York law contains a ‘default rule’ under which an arbitration clause is construed as allowing class arbitration in the absence of express consent.”¹³⁷ (Such a “default rule,” as we have seen, can indeed be found in the law of a number of jurisdictions, such as South Carolina.¹³⁸) Now the implication that the arbitrators were somehow obligated to expressly “identify” and articulate the basis of their award¹³⁹ -- and that we are not permitted to deduce one circumstantially *473 from the award itself -- is surprising to begin with.¹⁴⁰ A further implication is more startling still -- that if some textual hook, some “contractual basis”¹⁴¹ or “interpretive path,”¹⁴² can’t be found -- then the arbitrators, in the absence of any well-established judicial “default rule” that they could look to, will be powerless to spin out one of their own.¹⁴³ And finally -- and even more strikingly -- any observer must be bewildered by what this passage does not take into account: An unexceptional “default rule” is after all readily to hand, if one only takes the trouble to look for it. For a “meta-default rule” informs every feature of our law of arbitration -- I mean, of course, a background rule to the effect that by submitting to the process, the parties in cases of “silence” have presumptively entrusted to *their arbitrators* a wide-ranging power to determine just what form their proceeding will take.¹⁴⁴

*474 Here is one final test of the Court’s rationale: Suppose that an arbitrator were to issue a “clause construction award” holding that class-wide arbitration is permitted, and were to base his conclusion on a rule of applicable law to the effect that contracts are to be “construed against the drafter.”¹⁴⁵ This *contra proferentem* trope is often marginalized as a technique of construction “of last resort”.¹⁴⁶ Still *475 it may do occasional useful service as a “penalty default” -- setting the baseline *not at all* at what the parties “probably wanted” (or “would have wanted”), but precisely at what they would have wished to *avoid* -- in the interest of discouraging strategic behavior, inducing the more knowledgeable party to reveal information through attempts to contract around the default.¹⁴⁷ And “interpreting” a contract against the drafter can above all serve an openly redistributive function, correcting for “an imbalance in the fairness of the exchange.”¹⁴⁸ “It is chiefly a rule of policy, generally favoring the underdog.”¹⁴⁹ The one thing that this “rule” is *not*, clearly, is an interpretive guide aimed at ferreting out what the true “intention” or “meaning” of the parties truly was. (If there *was* any “intention” at all, surely we can attribute to the drafting party the will to draft in a way as favorable as possible to *himself*?) While it remains commonplace for *courts* to conjure up notions of *contra proferentem*, are we now, after *Stolt-Nielsen*, to conclude that this can no longer be part of the tool box of the arbitral “contract reader”?

*476 2. “Only One Possible Outcome on the Facts Before Us”

A first cut at the holding of *Stolt-Nielsen*, then, is that it represents a censure of the arbitral tribunal for presuming to go about deciding the case *in the way it did*: If all that the award amounted to, was the arbitrators’ attempt to “impose [their] own view of sound policy,” then it seemed to follow that the requisite “contractual basis” for the award must be missing.¹⁵⁰ This, as we

have seen, has troubling implications that extend far beyond the factual matrix of the case -- implications for the way in which arbitrators are now to be expected to do their work of contract "construction," and implications for the way in which courts may now respond to demands for annulment. It does not seem too much to say that it calls into question our traditional view of arbitration as an alternative forum for adjudication.

There is another way of looking at the holding, however, this somewhat more "substantive": It is that on the facts before the tribunal -- and indeed on any view of the case -- any award that would permit class-wide proceedings would be forever illegitimate.¹⁵¹ On this view there was simply "no need" to send the case back to the arbitrators for a re-examination.¹⁵² I suspect, as I have said, that in the *477 future even game attempts on the part of arbitrators to parse the language of the standard "broad" arbitration clause -- in the interest of finding authority for such an award -- will prove futile and likely to be rebuffed.¹⁵³ I am even more certain that in the future any attempt on the part of arbitrators to seek to buttress a class-wide award merely by claiming to have "selected the applicable law and applied it," will be equally misconceived.¹⁵⁴

The obvious reason is that the Court has in *Stolt-Nielsen* mandated a new and overriding "default rule" of its own, one of federal law -- and one that will prove particularly difficult to reverse. Under this "default rule" the absence of an acceptable "agreement" necessarily means that recourse to the AAA class procedures is foreclosed.

I concede it might be a bit extreme to claim, in a peremptory fashion, that arbitrators may no longer order class-wide proceedings in the absence of some actual "express" contractual stipulation.¹⁵⁵ But even so, at the very least, the proponent will now need to make a strong affirmative showing -- a showing (in text or context) that this was in fact the intention of the contracting parties -- in order to overcome the contrary presumption.¹⁵⁶ The formula that such a showing must be "clear and unmistakable" -- not being used so much anymore elsewhere -- will presumably be available, and would certainly be consistent with the spirit of Justice Alito's opinion. If left to their own devices, arbitrators, I imagine, could *478 have been expected regularly to find that class-wide proceedings were authorized.¹⁵⁷ But success in making the requisite case will now require some heavy lifting indeed.¹⁵⁸

This new federal "default rule" rests entirely on the assertion that class-wide arbitration "changes the nature of arbitration to such a degree that it cannot be *479 presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." And how precisely would a class-wide proceeding "change the nature" of arbitration?

- For one thing, many of the bargained-for "benefits" of the arbitration process -- its efficiency, lower costs and greater speed -- must be "less assured" once we are no longer dealing with the paradigm of "a single dispute between the parties to a single agreement," but rather with disputes involving hundreds or thousands of parties; at the same time,

- the "commercial stakes" of a class-wide arbitration may, through aggregation, be vast and actually comparable to those in class litigation, while in addition,

- the AAA "class rules" reverse and withhold arbitration's usual "presumption of privacy and confidentiality."¹⁵⁹

Like so much else in the Court's opinion, all this can readily be misunderstood. The Court is saying nothing in particular about whether a given process "qualifies" as arbitration, or about how to "define" the true "nature" of arbitration, or about what arbitration "really" "is"¹⁶⁰ -- an inquiry that has a conceptual, essentialist -- dare I say, "Continental" -- air to it. Thankfully the quest for the "true essence" of the concept of "arbitration" has not, in this country, been conducted with anything like the ingenuity and obsessiveness devoted to the task in some other legal cultures.¹⁶¹ Rather, the Court need only be taken as saying this: That the arbitrators' imposition of a class-wide proceeding,

- was so far outside the scope of the probable expectations of the contracting parties, and in consequence

- would so drastically alter the cost/benefit calculus of their original decision to arbitrate, that their agents should not have taken it upon themselves to do so -- not, at least, without some further indicia of the parties' agreement.

*480 Now this is in fact an attractive and measured argument.¹⁶² It has considerable appeal when we are looking at

commercial parties, particularly in the maritime context in which *Stolt-Nielsen* itself arose.¹⁶³ It also has some appeal -- of a different sort, perhaps, but still real -- in the context of contracts of adhesion with consumers and employees -- where concededly the drafter may have had reason to be aware of the possibility of class-wide proceedings -- but also, at the same time, where he had the motivation (and the probable desire) to structure the transaction in such a way as to avoid them.¹⁶⁴

***481** The delicate point lies elsewhere. This new “default rule” may in the abstract seem sane enough.¹⁶⁵ However sensible it may be, though, it does not come to us as mere counsel to guide the exercise of arbitral discretion -- but instead, as a limitation imposed by the state from outside the system entirely, and intended to demarcate the outer boundaries of arbitral “power.”¹⁶⁶ It is thus remarkably blind to the considerations of context and policy that usually inform the process of contract construction: Apparently we are asked to accept that our practice of leaving judgments with respect to the parties’ expectations in the hands of their chosen arbitrators -- a conventional assumption -- must now be overridden by

- the unusual nature of class-wide proceedings, coupled perhaps with

- the particularly acute danger of distortion through arbitral self-interest.¹⁶⁷

While default rules pervade so much of our law of arbitration¹⁶⁸ this is their first appearance in the form of rules that are said to govern the determinations of the arbitrators themselves, on pain of vacatur.

***482** In many ways *Stolt-Nielsen* might be considered a return to the run of federal cases predating *Bazzele*, where in the absence of a specific contractual command the consolidation of related arbitral proceedings was regularly refused: Judicial reticence rested not on the belief that it was the province of arbitrators rather than courts to take this step, but on the assertion that to do so would do violence to the (unexpressed) intention of the parties.¹⁶⁹ While such cases were not thought at the time to constrain state courts,¹⁷⁰ *Stolt-Nielsen* pretty clearly lays down a default rule to which state law must yield and state courts and arbitrators alike, in ***483** applying it, must honor.¹⁷¹ It does so by spinning out from the FAA a federal policy privileging party autonomy -- not only to preserve the freedom to arbitrate -- but equally in the interest of protecting the parties’ *freedom from having to arbitrate* in any particular manner. So what will be considered to be “in accordance with the terms of the agreement” must apparently be evaluated, not by the state law of contracts, but by a federal common law grounded in § 4; to “enforce arbitration as agreed” apparently means that state courts may not impose any form of proceeding alien to the parties’ expectations.¹⁷² Such a conclusion can ***484** only be buttressed by the Court’s more recent decision in *Conception*,¹⁷³ and there is in any event plenty of federal policy to go around.¹⁷⁴

Now I usually dread the appearance of the more vulgar forms of Legal Realism that tend to surface in classrooms after the first month or two of law school -- once students have been introduced to the liberating notion that legal doctrine does not, after all, really dictate results. But I suspect that such an attitude -- suggesting insidiously that everything ultimately is dissolved in interest, like the rivers in the sea -- might in fact have some legitimate purchase here. One would have to invest a good deal of time and effort before being able to identify cases -- which in the end amount only to a trivial number -- in which the Supreme Court has been willing to mandate or approve the annulment of an arbitral award. (And before now these have been strictly outliers, grounded either on the lack of any ***485** agreement at all,¹⁷⁵ or on some impropriety in the composition of the arbitral tribunal).¹⁷⁶ But then we come to *Stolt-Nielsen*: It can hardly be accidental that the specter of class relief in arbitration is just about the only feature of the arbitration process that has been anathema to the business community -- or that this rare decision restrictive of arbitral power happens, wonder of wonders, to be one in which a business-oriented court manages more or less to relieve it of any such anxiety.¹⁷⁷

If *Stolt-Nielsen* is in this sense entirely unprincipled, still -- if indeed the avoidance of class relief is the engine driving the machine -- the holding might be cabined as something of a “one off” -- that is, largely responsive to the unusual and dramatic feature of class proceedings.¹⁷⁸ If so, while it seems quite likely to ***486** create new uncertainty as to just what is encompassed by the mysterious prohibition of “excess of power,” it is also quite unlikely to force open very far the “door of vacatur.”¹⁷⁹

Our discussion of the remaining cases in the “trilogy” broadens out the discussion but is entirely consistent with what has gone before. While attempts to create class-wide proceedings are naturally most likely to occur in the context of contracts of adhesion, *Stolt-Nielsen* itself of course was not such a case. *Rent-A-Center* and *Conception* are by contrast both consumer cases, but all three decisions fit together seamlessly: All three confirm the impression of a highly politicized subject now remarkably and tightly intertwined with wider issues of social justice and corporate power. All three are exactly what we

might expect from the current Court.

The incorporation of arbitration clauses in contracts of adhesion is obviously one of the most fraught topics in our current law, and the symbiotic relationship between the law of arbitration and the contract doctrine of “unconscionability” one of the most intriguing.¹⁸⁰ (Our “trilogy” in fact *487 followed closely on the heels of the NAF fiasco, something that must inevitably color our view of the relentless nature of the Court’s jurisprudence.)¹⁸¹ In particular, *Rent-A-Center* and *Conception* are situated right at the heart of these developments.

*488 II. *RENT-A-CENTER*: “UNCONSCIONABILITY” AND “DELEGATION” TO THE ARBITRATORS

“This was surely carrying lucidity to dazzling-point.”¹⁸²

Rent-A-Center was an action by an employee alleging racial discrimination in violation of 42 U.S.C. §1981. There was a “free standing” four-page “Mutual Agreement to Arbitrate Claims,” but the employee claimed that this agreement was “unconscionable,” both “substantively”¹⁸³ and “procedurally.”¹⁸⁴ The district *489 court granted the employer’s motion to dismiss the suit and to compel arbitration; the Ninth Circuit agreed that the claim of “unconscionability” was a challenge to the arbitration agreement “itself” -- and thus necessarily a matter for a court to decide -- but held also that since some aspects of the “unconscionability” challenge had not been addressed below, the case had to be remanded to permit the district court to “complete its analysis.”

The Supreme Court reversed, split 5-4 in its now stable and predictable fashion.¹⁸⁵ Apparently there was no role for a court here at all -- so that any challenge to the validity of the arbitration agreement must be “left” for the arbitrator.

Now the flow of the argument here can readily be made to track familiar doctrine, and so ought to be quite straightforward indeed. I have mentioned *Rent-A-Center* in conversations with sophisticated foreign academics who had not been following the litigation, and very soon after I started to describe it, they were finishing my sentences for me. Concededly there are some implications of the decision that may be worrisome; and certainly the analysis prescribed by the Court may, over time, wind up posing real challenges of practical administration in the working out of our law of arbitration. I will get to that shortly. But to posture that the Court’s ruling is in any way “inexplicable” or “baffling” -- let alone “fantastic,”¹⁸⁶ “dizzying”¹⁸⁷ or “bizarre”¹⁸⁸ -- nevertheless strikes me as really, *490 rather extravagant: Repeated often enough, it almost causes me to feel as if somehow, possibly, I might actually be missing something.

A. *Prima Paint*

The obvious starting point is the teaching of *Prima Paint*¹⁸⁹ -- which I take to represent nothing more than a sensible (and reversible) presumption with respect to the contractual allocation of responsibility between courts and arbitrators.¹⁹⁰

If one party to a contract claims, say, that the other has lied about the goods or services he promised to provide -- then (whether or not we trot out the term “fraud”) we have a discrete controversy between them. And it is canonical that given their presumed preference for “the practical advantages of one-stop adjudication,”¹⁹¹ they should be taken to have wished to entrust this dispute to the same decision-maker who will -- in any event -- pass on the overall “merits” (with which it is likely to be intertwined). Precisely the same thing is true if the claim is to the effect that the contract should be excused on the ground of mutual mistake or frustration -- or if the claim is that the contract should not be enforced for failure to comply with mandatory state law -- regulating, say, the payroll lending industry or the profession of accountancy.¹⁹² And precisely the same thing is true if it is alleged that the contract has impermissibly restricted one party’s rights -- say, to receive consequential damages, or punitive damages, or attorneys’ fees -- or other relief granted by statute.¹⁹³ Note that nothing here is the result of any intrigue plotted under cover of darkness by a neo-liberal Court -- it is instead taken for granted in every modern regime of arbitration as the “foundation stone of the entire structure.”¹⁹⁴

Prima Paint is thus a background rule of contract construction formulated by the courts to help determine what is deemed to be “arbitrable.” It has long been a *491 commonplace that in assessing what the parties intended to arbitrate, courts should resolve “doubts concerning the scope of arbitrable issues” “in favor of arbitration”; by contrast, before holding that any dispute falls *outside* the scope of an agreement we should be required to say “with positive assurance that the arbitration

clause is not susceptible of an interpretation that covers" it.¹⁹⁵ And *Prima Paint* itself is nothing more than an application of this familiar rule of federal common law. Once allocated to them by the court, the arbitrators' "jurisdiction" over the dispute is conclusively established; as a consequence their decision has precisely the same finality -- no more, and certainly no less -- than is enjoyed by any award rendered pursuant to an arbitration agreement -- that is after all what an allocation of authority means.¹⁹⁶

But none of this, of course, can have any particular purchase where the parties disagree over whether they have entered into any binding agreement to arbitrate in the first place. The abundantly simple explanation is that when the validity of the arbitration agreement itself has been "called into question"¹⁹⁷ -- when, in the usual *492 formulation, a challenge "goes to" the arbitration clause -- one party is in fact claiming that he has never effectively given the arbitrators any power over him to do *anything*. And so the usual implications of that consent -- what can be spun out of the agreement to arbitrate -- the presumed grant of authority on which *Prima Paint* rests -- can lead us precisely nowhere.¹⁹⁸

The employee in *Rent-A-Center* was clearly trying to evoke this principle, in which attacks on the arbitration clause "itself" must be reserved for the court. The easy cases may point to the absence of any manifestations of mutual assent at all (e.g., the "battle of the forms," or signatures that are forged or unauthorized) or -- largely but not entirely a *hypothèse d'école* -- they may point to some fraudulent representation that has been made concerning the arbitration agreement itself.¹⁹⁹

*493 But the relevant universe is far larger than that -- and so this is a first cut at *Rent-A-Center*. A common assertion is that the arbitration process has been so structured as to prevent the claim of the weaker party from being properly heard: Whatever the applicable "substantive rules," it is asserted that the forum itself has been stripped of those elements of fundamental fairness that alone could justify a waiver of the right to proceed in court. "These are the cases in which the putative defect is 'wrapped up,' or 'enmeshed,' in the very process of arbitration -- to the point indeed that it would be difficult even to imagine a tribunal able to reconstitute itself by setting the offending provision aside."²⁰⁰ While this rationale sweeps in challenges to the impartiality of the arbitrator,²⁰¹ to the distant site of the hearings,²⁰² or to contractual limitations on discovery,²⁰³ allegations of *494 prohibitive costs seem to be the most fruitful source of modern litigation²⁰⁴ -- and this was probably the best card the employee had to play here. That is why both the dissent and (by implication) the majority in *Rent-A-Center* agreed that the employee's challenge to the arbitration clause presented a "gateway" question of "arbitrability" that would ordinarily fall to be decided by the court.²⁰⁵

B. First Options

"I will go back to First Options, which I thought was of gem-like clarity -- And I am apparently the only one in the world who thinks that."²⁰⁶

All quite unproblematical so far. But we have to bear in mind -- once again -- the implications of the overriding principle of party autonomy: Here, the implication is that contracting parties must be free to submit *any* dispute between them to an arbitrator for final resolution, if they have truly chosen to do so: "A dispute over whether I have validly agreed to *anything* is a dispute like any other, which parties can presumably resolve as they wish -- at least I can conjure up no reason to exclude this question in particular from our regime of private ordering."²⁰⁷ So while the validity of a consent to arbitrate is in normal circumstances a question of "arbitrability" reserved for a court, there is certainly no mandatory interest of public policy -- still less can there be any logical or conceptual barrier -- that can be imposed to override a party preference for submitting such questions to private decision-makers.

As we all remember, Justice Breyer's celebrated "dictum" in *First Options* expressly envisaged this possibility:

Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* *495 matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate.²⁰⁸

Immediately after the decision in *First Options*, the AAA revised its arbitration rules to take advantage of this space that had been opened up -- and to treat a contractual incorporation of the AAA's rules as amounting precisely to this sort of agreement.²⁰⁹ American courts will now routinely hold that merely choosing to arbitrate under these rules is itself a decision to take advantage of the *First Options* dictum.²¹⁰ (Indeed courts are increasingly likely to attribute precisely the *496 same effect to the canonical "broad clause" even in the absence of any institutional rule.)²¹¹

Now this “agree[ment] to submit the arbitrability question itself to arbitration” is precisely what the parties appear to have signed in *Rent-A-Center*. Their arbitration agreement included a sweeping provision to the effect that The Arbitrator, and not any federal, state, or local court or agency shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.²¹² The Supreme Court called this a “delegation” to the arbitrators -- a term that will have legs.²¹³ One does still continue to come across the occasional confident assertion that such a contractual readjustment of the FAA’s default allocation of authority between courts and arbitrators is somehow illegitimate -- that within the structure of the statute, the power to determine whether a duty to arbitrate exists *497 remains a “nondelegable judicial function”²¹⁴ -- but this is a purely *a priori* argument that has certainly not improved with age.²¹⁵

C. A “Real” “Delegation”

However, there is something else -- however obvious -- that I gather we need to be reminded of: In all of this we must satisfy ourselves that there has been a “real” “delegation.” No more than with respect to the arbitration clause itself, it *498 could not possibly be supposed that mere printed words on a piece of paper can themselves somehow be self-validating.²¹⁶ One must enter into the system *somewhere*, and the notion of a submission that is “the product, apparently, of some curious process of autogenesis,”²¹⁷ is completely alien to our jurisprudence. Nothing in *First Options* suggests for a minute that a court will defer to any embedded contractual provision that purports to “delegate” to an arbitrator the power to decide whether an arbitration clause is valid, over the objection that a signature was forged or obtained at gunpoint, or that one of the parties was a lunatic or a mewling infant.

This is presumably all that Justice Thomas was getting at in *Granite Rock* when -- in holding that issues “calling into question” the arbitration clause must presumably be resolved by the court -- he added distractedly that, “*absent an agreement committing them to an arbitrator*, such issues typically concern the scope and enforceability of the parties’ arbitration clause,” and “in addition, these issues always include whether the clause was agreed to, and may include when that agreement was formed.”²¹⁸ This is inartful and indeed slipshod: In that sentence, just what is the italicized phrase intended to modify? Does the syntax (and the later insertion of the word “always”) really suggest that a “delegation” can *only* encompass questions of “scope and enforceability” -- and can *never* address issues of contract “formation”?²¹⁹ I would hope not, for drawing such a line would ineluctably lead us back into all sorts of doomed quixotic metaphysical *499 speculation about the nature of a contract’s “coming into being” or “existence.”²²⁰ It is always a mistake to overread Justice Thomas.

I would think that his digression in *Granite Rock* does nothing more than underline one point that is already abundantly familiar. It is this: Where it *does indeed appear to be the case* that any true manifestation of mutual assent is completely lacking -- for example, once again, the mythical (but always-convenient) gun to the head,²²¹ the forged signature, “fraud in the factum,” the *500 expressly conditional and inadequate “acceptance,” the lack of authority of a purported agent²²² -- such a failure will necessarily -- by the same token, and at the same time -- bring with it the failure not only of an arbitration clause, but of any “delegation” clause as well. For in these circumstances, there has been no effective consent to anything at all. Here our rule of thumb will have to be that some “truly distinct” agreement -- and one that is in fact “chronologically subsequent” to the principal contract -- is necessary before we can consider that the arbitrators have been given the power to determine their own jurisdiction.²²³ That would certainly be the sensible response to particular cases such as the ones I’ve just mentioned, but -- as usual -- logic or *a priori* “impossibilities” will lead nowhere. For after all, rules of law can never be “impossible”; they are merely more or less well- or ill-advised.²²⁴

*501 Nor is this just a matter of striving to come up with the proper taxonomy. Rather one needs to ask, in individual cases, this question: What is it that might affect the legitimacy of a purported *First Options* “delegation”; what is it that might prevent it from masquerading as an ordinary *exercise of contractual autonomy*? If everything were as simple as the paradigm cases just noted, scholarship here would be even more pointless than usual.

So, however characterized, some attempts at “delegation” *will* necessarily fail along with challenges to the arbitration

agreement generally. (In addition to the examples just mentioned, consider a “delegation” to an arbitrator who is securely in the pocket of an employer or a lender, and who is nevertheless charged with deciding whether arbitration by him of an employment or loan dispute would be “unconscionable.”)²²⁵ And -- this is the point of *Rent-A-Center* -- some, just as clearly, will not. (Consider a “delegation” to an arbitrator charged with deciding whether the arbitration clause has been terminated, or canceled, or superseded, or abandoned, or whether it has simply expired.)²²⁶

If this discussion has seemed to track closely some of the accumulated learning that has already grown up around *Prima Paint* itself, that after all would only be natural -- for it would reflect our understanding that both *Prima Paint* and *First Options* are equally dependent on the values of private autonomy that inform every aspect of our law of arbitration.²²⁷ Thus, just as a court must satisfy itself *502 under *Prima Paint* that there has been a valid arbitration agreement,²²⁸ so here a court must satisfy itself that any delegation of jurisdictional authority to arbitrators *is itself* valid and enforceable and immune from challenge. To believe (as I do) that in this sense virtually everything is ultimately reducible to Contracts -- that arbitration must be understood “through the lenses of contract,” and that “the only serious inquiry ought to be one into the understanding and underlying assumptions of the contracting parties”²²⁹ -- will undoubtedly be seen in some quarters as betraying a lamentable incapacity for sophisticated thinking.²³⁰ Still, *503 this does seem most congruent with our usual view of the arbitration process as an integral part of a system of private ordering and self-determination.

So: Is it the case that the asserted “unconscionability” of an arbitration clause should be taken to impair the willingness of the parties to arbitrate the matter? Pretty clearly the answer is the reliably infuriating “maybe.” That is, this may or may not be the case, but at least there is no reason to assume that this will always or “necessarily” be the case.²³¹ A contractual provision requiring, say, a biased decision-maker can indeed reasonably be taken to affect the validity of assent -- and, as Justice Stevens put it in dissent, it may suggest the absence of any “meaningful agreement” to a supposed “delegation”²³² -- and in these circumstances a court will refuse to allow proceedings to go any further, treating a mere signature²³³ or any other indicia of “bare formal assent”²³⁴ as simply irrelevant. But because the inquiry into “unconscionability” is so inescapably fact-intensive and muddy, we should not assume that this need always be true -- no more than we should assume that claims to the effect that the *overall* contract between the parties is “unconscionable” need always call into question their willingness to submit *that* question to arbitration.²³⁵

*504 Consider then the particularly fraught case of a challenge to an arbitration clause on the ground that the expense of the arbitral process to be borne by the adhering party will be unduly burdensome. Without more, this might be thought in the first instance to be for the court²³⁶ -- and to require the resisting party to bear the burden of making to the court the *Green Tree* demonstration that there is a “likelihood” that he will incur “prohibitive costs” that would “preclude” him “from effectively vindicating” his rights in the arbitral forum.²³⁷

*505 Now imagine an adhesion contract that

- imposes on an employee or consumer the obligation to pay half the costs of arbitrating “the merits,” in all circumstances and regardless of the outcome; and which

- delegates to the arbitrators themselves the authority to determine the validity of such a provision; but which, in addition,

- requires the employer or seller -- presumably the proponent of the clause -- to bear *all of the costs* of any proceeding that may be necessary to make such a determination.

This is (once again) a quintessential issue of the law of private agreement. The arbitration agreement’s general cost-splitting arrangement might indeed be thought to constitute intolerable overreaching -- but even so, just what might taint the allocation of authority *to the arbitrators* to determine the “unconscionability” of the clause? The resisting party would need to make the right contract-based doctrinal moves to force such a conclusion, but I suspect that one will not readily be available: The overriding principle here is that the plaintiff should only be thought to be prevented from “vindicating his rights,” if *his access to a fair arbitral forum is impaired* -- “if the terms for getting an arbitrator to *decide* the issue” of “unconscionability” are “impossibly burdensome.”²³⁸ And here, *506 presumably, they are not. There is nothing particularly exotic or far-fetched about this hypothetical,²³⁹ which merely underscores the simple consequences of the fact that certain defects do call into question the legitimacy of private power, and others don’t.

Rent-A-Center itself was perhaps not quite so helpful. Nevertheless Justice Scalia seemed to hint that the case was in fact functionally identical, or at least close along the line. For the employee had failed to make the critical argument: He had not, that is, claimed that the challenged provisions of the agreement -- the limits on discovery, the requirement of cost-splitting -- themselves called into question the arbitrators' authority to determine the enforceability of the arbitration clause. There was thus a simple failure of the requisite proof that the employee's purported obligation to submit *that* issue to arbitration was "unconscionable"; the employee, in short (and perhaps understandably) had not adequately internalized the teachings of *First Options*. And Justice Scalia tipped his hand by suggesting that he knew in any event what the answer would be: For surely it would be "much more difficult" for the employee to establish

- that limitations on discovery, or excessive costs, made it too burdensome for the employee to arbitrate the limited issue of the "unconscionability" of the agreement,

- than it might have been to establish that the agreement's restrictions made "unconscionable" the obligation to arbitrate *the underlying racial discrimination claim* that was the subject of the lawsuit. The latter question was naturally more "fact bound," "more complex and fact-related" -- but was made quite irrelevant to any decision in *Rent-A-Center*, by the "delegation" to the arbitrators.²⁴⁰

All this was largely *ex cathedra*, but still was a nod in the direction of what was relevant.²⁴¹

***507** Still other cases might be thought more straightforward and thus more satisfying. For example, suppose there has been a claim of "unconscionability" based on the assertion that the agreement calls for the protected party to waive "statutory remedies": This, I believe, ought in all cases to be presumptively for the arbitrator anyway.²⁴² But even those who disagree with me on this find no reason, apparently, to doubt the validity of a *delegation* of the "unconscionability" question to an impartial arbitrator.²⁴³

And finally, here is an even cleaner case that might be worth a paragraph or two: Suppose there has been a claim of "unconscionability" based on the once-popular assertion that an express clause in the agreement forecloses the ability of claimants to proceed on a class-wide basis;²⁴⁴ suppose, though, that the parties have purported to expressly allocate such a question (in normal circumstances for the court), to the arbitrators themselves: How could the alleged "unconscionability" of individual proceedings possibly be thought to affect the validity of such a "delegation"?

Now we will turn shortly to *Concepcion*, the last panel in the triptych. But as all these decisions are closely intertwined, a slight digression to take in the implications of that case seems warranted right now. In *Concepcion* the power of courts to hold a class-action waiver to be "unconscionable" was severely truncated, if not indeed eliminated entirely.²⁴⁵ Could the analysis there possibly serve to take away from *the arbitrators themselves* any delegated authority to do the same thing? I think not: That a state's intervention in the arbitral process may be thought to be illicit under the mandate of § 2, and thus "preempted" -- which is the rationale of *Concepcion* -- need hardly affect the extent of deference due to the parties' grant of power to private decision-makers, or cause an arbitral award that refuses to honor a ***508** class-action waiver to be deemed an "excess of power" under § 10.²⁴⁶ The thrust of the Court's decision in *Concepcion*, after all, is that a state rule that

***509** • prevents an arbitrator from going forward on an individual basis -- and that,

- by taking the case away from him, denies him the power to honor what the contract as written may have called for -- is an interference with the "central purpose" of the FAA, which is taken to be to enforce "private agreements" "in accordance with their terms," and thereby to "promote arbitration."²⁴⁷ Given this premise, it seems rather hard to argue that these legislative goals would be in any way disserved where an arbitrator -- in exercising powers "delegated" to him -- has actually proceeded to answer the question that he has been asked.

Decidedly we are very much here in the realm of Paradox -- for this can hardly be what the draftsman of a *First Options*-style "grant of the power to determine arbitrability" was likely to have had in mind. The point of these "delegation" clauses, after all, is to pry challenges to arbitration out of the hands of the courts -- entrusting them to arbitrators who can be counted on to adopt a more benevolent attitude. But judicial hostility to arbitration based solely on the need to preserve class-wide proceedings will *already* have been safely cabined and largely put out of reach by *Concepcion*.

In addition, in such a case the effects of an arbitrator's adjudication under his "delegated" powers would be unpredictable indeed. Even an arbitrator who finds a class waiver "unconscionable" still could not proceed to order class-wide proceedings -- which was expressly ruled out by the terms of the contract: Striking down the clause as unenforceable is hardly the same thing as saying that it never existed at all -- and even if we were willing to shut our eyes and pretend that it never did -- pretend, that is, that the waiver didn't embody the true agreement of the parties -- what would follow? Merely that we would find ourselves back in that dreaded "silence" which *Stolt-Nielsen* found inadequate. On the other hand, an arbitrator who finds an insistence on individual proceedings to be abusive, presumably couldn't go forward on that basis either. While he thus seems unable to proceed to adjudicate the merits at all, any award limited to the invalidity of the waiver would presumably have a res judicata effect, denying to the drafting party the ability to contract out of class litigation.

One final point: While, as I have said, *First Options* requires a "real" "delegation" to the arbitrators to determine their own jurisdiction -- a legitimate exercise of contractual autonomy -- we must put to one side any supposed need for this grant of authority to be "clear and unmistakable." This much-misunderstood trope from the *First Options* opinion should have no resonance at all in *Rent-A-Center*. We all know that whatever is said in the course of any judicial opinion *510 can only be interpreted in light of the particular question posed to the court. So it cannot be repeated too often that the notion of a "clear and unmistakable" submission -- of a somehow particularly explicit consent to arbitral jurisdiction -- arose strictly out of the specific problem posed by the fact pattern in *First Options* itself. The critical element there was the familiar, cruel dilemma faced by a respondent against whom an arbitration has been initiated, but who believes that he is not in fact subject to any obligation to arbitrate; the "clear and unmistakable" formulation was seized on by Justice Breyer in the interest of preventing such a respondent -- who claims that he never signed the agreement in his personal capacity -- "from having to steer at his peril between the twin dangers of default and of being inadvertently found to have 'submitted' to arbitration."²⁴⁸

So to require in these circumstances that a submission be "clear and unmistakable" reassures the respondent that the mere fact of having argued "lack of jurisdiction" to the arbitrators will not in itself be taken as consent to let them make the decision. This, then, is nothing but an insistence on clear statement, a "conscious interpretive strategy" aimed at giving a fair "account of what might otherwise be thought equivocal behavior."²⁴⁹ The work done by the "clear and unmistakable" trope in the dialectic of *First Options* is in simple opposition to any claim of "implied consent."²⁵⁰

*511 Where the parties have concededly chosen an arbitrator to do *something* -- and where the question is therefore *what sorts of things* an arbitration clause was meant to cover -- this formulation has been largely, and deservedly, forgotten.²⁵¹ By contrast, a contractual grant of authority to decide the jurisdictional question of core consent -- whether the parties have *any valid agreement at all* -- would be somewhat more unusual; in that situation -- for which it was originally designed -- a standard requiring greater clarity of expression would thus only be natural. But bear in mind that the only justification for expecting a "delegation" to be "clear and unmistakable" -- the only function of any such requirement -- remains the same; it is *the assistance this gives in the interpretation of "silence or ambiguity" in whatever the parties have said or done* touching on the appropriate decisionmaker.²⁵² For this reason it would be a blatant misreading of *First Options* to *512 suggest that whenever the validity of a "delegation" is called into question, a court must find "clear and unmistakable evidence of an agreement to arbitrate."²⁵³ Naturally the burden of proof as to the existence of *any* agreement is always on the proponent²⁵⁴ -- but it would obviously be contrary to federal policy to suggest that he must carry a burden higher than is usual in civil cases, or that the "threshold" of enforceability is "greater than with respect to other contractual terms."²⁵⁵ So it is not so much that the Court in *Rent-A-Center* "declined to adopt the 'clear and unmistakable' rule that it had previously endorsed"²⁵⁶ -- it's rather that the Court recognized that the rule was irrelevant to the problem before it.

*513 D. *Rent-A-Center* and Judicial Craftsmanship

Now it will be noted that I haven't said much here about the actual structure of the argument in the majority opinion. I doubt, after what has gone before, that doing so is particularly necessary -- or even that it is likely to add much to our understanding of the case. It might, though, just possibly have some bearing on the flurry of litigation that alas seems certain to follow.

Justice Scalia seemed for some reason intent on characterizing *Rent-A-Center* as a straightforward application of *Prima Paint*: Supposedly the employee's claim of "unconscionability" challenged "the validity of the contract as a whole" -- but not, by contrast, the validity of "the delegation provision specifically" -- and therefore it was, under the teaching of *Prima Paint*, an issue reserved for the arbitrator.²⁵⁷ This makes for a rather idiosyncratic view of a simple-enough problem: It will be

remembered that the only written “contract” here was the four-page, stand-alone arbitration agreement -- so in this case, the “underlying contract” “as a whole” must mean, conceptually, “the rest of the agreement to arbitrate.”²⁵⁸ The opinion can thus be diagrammed as follows:

Just as a “container contract”: is to a “separable” arbitration clause [*Prima Paint*], so [=] a standalone arbitration agreement: is to a “separable” “delegation” clause [*Rent-A-Center*].

In all respects the analysis is the same, and in both cases challenges to the former are presumed to be entrusted to the arbitrator.²⁵⁹

What can explain this curious manner of proceeding? My own best guess is that all of this is a simple application of the insidious Law of the Conservation of Energy: Conceptualizing *Rent-A-Center* in this way allowed Justice Scalia to map onto the case precisely the same picture of “separability” that he had already drawn a few years earlier in his opinion in *Cardegnà*.²⁶⁰ And so it should not be surprising that we find the *Rent-A-Center* decision filled with the same bits of rhetoric, and the same verbal tics, that were the centerpiece of *Cardegnà*: There is, for example, the same Scholastic and profoundly unhelpful dichotomy between the “validity” of an agreement and its “existence.”²⁶¹ And there is above all the *514 same contrived insistence that it is only challenges “specifically” to the separable arbitration clause that should be reserved for a court.²⁶²

Now this latter point deserves a brief discussion. The term “specifically” is deeply ambiguous: One possible meaning is dangerously false; the other is true, but trivial.

When we say that it is for a court to pass on challenges that go “specifically” to an arbitration clause (or to a “delegation” clause), does this mean

- that a court may intervene *only* if the challenge *uniquely* targets the objectionable clause, *alone and to the exclusion of everything else*? So here, the implication would be that where this is not true -- that is, where instead the challenge can be characterized as impugning the “whole” agreement, even if that happens to include the arbitration clause as well -- then the court would necessarily be barred from any role at all?²⁶³

*515 Or alternatively, does this mean

- that a court may intervene whenever a challenge can be shown to *extend to* -- that is, to have *some particular reference to* -- the arbitration clause?²⁶⁴ So here, the implication would be that in order to reserve a challenge for the court, the resisting party need merely demonstrate that *the clause itself* is of dubious validity. (Whether it happens to be of dubious validity along with the rest of the agreement -- or of dubious validity all on its own -- is a matter as to which we would be completely indifferent.)²⁶⁵

*516 This latter reading would be sensitive to the imperative contractual nature of the process -- to the Prime Directive, which is that arbitration can only be legitimated *by a legally enforceable assent to submit to it*. In order to avoid bootstrapping, any challenge calling into question an enforceable obligation to arbitrate can only be decided by a court -- and it is hard to find much relevance in the possibility that the rest of the “whole” agreement may be equally flawed.²⁶⁶ The former reading, by contrast, seems to serve no purpose at all that I can discern, and is not remotely sensible. (Unless, perhaps, the underlying assumption is that a full de novo review of validity will always follow as a matter of course after the award²⁶⁷ - although in this, it would be totally at odds with the entire procedural framework of our law of arbitration.²⁶⁸)

*517 If the Court’s invocation of *Prima Paint* here seems problematical, it is not so much that it is likely to affect results in concrete cases -- I doubt that it will. It is rather, first, that this construct, however elegant and ingenious, is intricate and recondite to a degree that seems wholly unnecessary²⁶⁹ -- to the point that lower courts may now feel burdened by having to master what appears to them to be some wholly “new system” in which “the line[s have] shifted.”²⁷⁰ Worst of all, it is that the whole complex superstructure of the argument may place too great of a strain on minds not prepared to deal with it.²⁷¹

Even in its most anodyne applications, the rule of “separability” -- thought in most legal systems to be a cornerstone of arbitration practice -- frequently raises stumbling blocks to understanding and (to my perpetual surprise) doesn’t yet seem in

this corner of the world to have been completely internalized.²⁷² And in dissent even Justice Stevens, astonishingly, joins in the chorus of doubts: He may indeed have concurred without demur in the earlier *Cardegna* decision,²⁷³ but here he is *518 suddenly deprecating *Prima Paint* as “fantastic” and “likely erroneous” and “difficult for any lawyer -- or any person -- to accept.”²⁷⁴

You will be relieved to hear that I have absolutely no intention of revisiting any of that here. Perhaps, though, I can add one word on a curious feature of his opinion: *Prima Paint*, he adds, is “akin to a pleading standard,” “a pleading rule,” requiring a party challenging the validity of an arbitration agreement to “expressly say so” with some “specificity.”²⁷⁵ By contrast with *First Options* -- which alone is truly “concerned with the parties’ intentions” -- *Prima Paint* is “concerned with *how* the parties challenge the validity of the agreement.”²⁷⁶

This is simply grotesque, for it trivializes what has long been a working presumption that attempts to demarcate in a useful way the respective roles of courts and arbitrators. *Prima Paint* is hardly a mere “pleading rule” that is indifferent to “the parties’ intentions” -- it is rather, a default rule *precisely attuned to probable party preference*, and necessarily triggered in the first instance by an enforceable agreement to submit to arbitration.²⁷⁷ This view of the matter will necessarily call for some preliminary inquiry into what defects might impair the validity of such an agreement -- for without it, any rationale for deference to an arbitral determination disappears. Here the resisting party will naturally be expected to carry at least the burden of going forward, and of presenting a claim -- and more, an argument -- and still more, a concrete demonstration -- to the effect that what appears to be an exercise of private autonomy should not be honored.²⁷⁸ Of course, on the margins we will inevitably find tendentious characterization in the crafting of such complaints²⁷⁹ -- but the need to identify the gravamen of the *519 challenge doesn’t go away. And some degree of uncertainty may have to be tolerated as the inevitable consequence of any standard that is not self-applying.

Now in *Rent-A-Center*, as we have seen, there is *only* an arbitration agreement in play (that is, the arbitration agreement must necessarily be viewed in abstraction from any “container contract” -- which may not even be present). In such circumstances I fear that the whole conceptual framework mandated by Justice Scalia -- by which a court is expected to inquire into what “goes” “specifically” to the “delegation,” as opposed to the “agreement as a whole” -- is likely to prove a tad oversubtle for sensible application. This is carving up the available universe pretty fine, and requires line drawing that may seem artificial to the vanishing point.²⁸⁰ To commit oneself to repeated exercises calling for such degrees of ingenuity is always a sign of imprudence.

But then, *Rent-A-Center* was never really about *Prima Paint* in any meaningful sense, anyway -- which suggests to me that the Court would have done better not to have dragged all that learning into the open once again, frightening the horses. As we saw earlier, *Prima Paint* is about nothing more than *the drawing of inferences from a broad arbitration clause* -- where a court will think it natural to suppose that the parties had chosen to entrust to the arbitrators themselves decisions with respect to the validity of the overall contract. (And so it is not terribly different from our “presumption of arbitrability,” both default rules of federal common law and both equally binding on state and federal courts.)²⁸¹

By contrast *Rent-A-Center* poses a higher-level question -- that is, “who is the appropriate decision-maker charged with determining *whether there was a valid* *520 *agreement in the first place* to arbitrate the validity of the overall contract?”²⁸² And in *Rent-A-Center*, the thrust of the *Prima Paint* argument seems entirely unnecessary: For there would, after all, be no occasion whatever to indulge in *any* drawing of inferences where the parties have already allocated this power explicitly to the arbitrators.²⁸³ Unless the *First Options* “delegation” itself can be challenged as an illegitimate exercise of contractual power -- which is our sole concern -- we must not go any further; the irrelevance of *Prima Paint* is in fact what *First Options* is all about.

Now it would be no great contribution on my part to re-introduce, into this doctrinal discussion, the necessary note of Realism: It is clear enough that what is in play here -- as indeed throughout the recent “Trilogy” -- is the political storm swirling around the subjection to arbitration of what Professor Sternlight is often *521 pleased to call “the little guy.”²⁸⁴ Both nature, and training, and the understandable desire to play to my strengths, make me reticent to stray too far from the comforts of doctrine -- particularly when it would take us right into this fraught debate about the distribution of social wealth. I will merely suggest that someone, in the course of this discussion, might at least nod in the direction of taking account of the exigencies of mass contracting -- of the need to make the necessary allowances for what is driven by the efficiencies of standardized forms and by the practical commercial need to control agents and to rely on written instruments.²⁸⁵ It is quite

plain -- indeed it is in the very nature of every contract of adhesion -- that the drafter will act in such a way as to load it up with "self serving provisions," aimed at "further[ing] its own self-interest (rather than the common good)."²⁸⁶ It is somewhat less obvious why this should be thought to be self-evidently undesirable -- that is, why the terms of a contract should ever be viewed in isolation, and abstracted, from questions of relative economic strength, and why they should not instead reflect with some accuracy the power imbalances and allocation of risks that are dictated by and reflected already in the parties' overall relationship.²⁸⁷

*522 Of course, to enter into a contract is to engage in "lawmaking"²⁸⁸ -- but that has been well understood since the time, say, of Napoleon.²⁸⁹ In a consumer society the realities of mass contracting track closely the realities of mass democracy, as in both cases knowing and attentive participation in the process is all but notional. The only question, there as here, is how -- and by whom -- any delegation of "lawmaking" power is to be policed, in order to insure the observance of minimal standards of decency.²⁹⁰

In that respect, one final observation: The nicer and fussier and more discriminating the conceptual inquiry required by *Rent-A-Center* -- and the greater the doctrinal uncertainty to be exploited -- the wider, in consequence, may be the opening for manipulation by aggressive counsel and recalcitrant judges. Such opportunities will be magnified at the very outset by the very definitional indeterminacy of modern standards of "unconscionability." Crafting the right sort of challenge is a constant process of discovery -- certain grounds for attack fall away or are gradually recognized as being beyond the pale;²⁹¹ the boundaries are *523 then tested, and others gingerly admitted.²⁹² If Justice Scalia's riff on *Prima Paint* is properly understood, the possibilities for challenge are extended still further.²⁹³ So although the clear implication is that *Rent-A-Center* was understood as an attempt to hold back the growing torrent of challenges to arbitration clauses -- and then to channel them, to the extent possible, to arbitrators with a stake in the system²⁹⁴ -- it might be a good idea, for a little while anyway, to eschew hysteria.²⁹⁵

*524 III. *AT&T MOBILITY v. CONCEPCION*: "UNCONSCION ABILITY" AND THE ROLE OF STATE LAW

"This is a devastating decision for people whose practices depend on class actions," said San Francisco employment attorney Cliff Palefsky, who's brought class actions in the past but doesn't specialize in the area now.²⁹⁶

We remember that the Court's 2003 decision in *Bazze* was widely taken to be an "endorsement" of a "new norm of classwide arbitration"²⁹⁷ -- and so it was inevitable that we would see corporate draftsmen immediately engage in measures of avoidance, adding provisions to form contracts purporting to bar arbitrator-certified class arbitrations (or in the common parlance, to "waive" the right to proceed as a class).²⁹⁸ Now after the seminal (and easy) cases like *Southland* and *Casarotto*, the nerve center of local political resistance to the growing use of arbitration clauses in adhesion contracts has shifted from state legislatures to state courts.²⁹⁹ And in the unedifying tug of war that followed hard upon *Bazze*, the natural response of many state courts was to refuse to honor such clauses on the ground that they were "unconscionable."³⁰⁰ During the brief interval between *525 *Bazze* and *Stolt-Nielsen*, it may have seemed that one live option open to these courts was simply to "strike" or "sever" the offending provision -- thus leaving them free to order arbitration on a class-wide basis,³⁰¹ or at least to allow the arbitrator himself to certify a class.³⁰² But this should no longer be possible³⁰³ -- so that the only course remaining to a court inclined to a finding of "unconscionability" was to deny the drafter's right to arbitrate anything at all.³⁰⁴

*526 Now before going any further we might well ask whether this story about "unconscionable" "waivers" had any continuing valence after *Stolt-Nielsen* anyway: What after all would be the point of such a provision, if mere "silence" -- without more -- sufficed to rule out class-wide proceedings?³⁰⁵ (Other perhaps than to warn off the occasional rogue arbitrator with a propensity to "construct" whole edifices of "consent" on the sandy soil of ambiguity.)³⁰⁶ That rhetorical question leads directly to a more fundamental point, one that does not seem to have been generally commented upon: Nothing in any state rule of "unconscionability" seems logically to depend on *an actual clause in a contract* purporting to bar class-wide proceedings: For why might such clauses ever be thought "harsh or unfair"? Presumably because they are intended to prevent weaker parties "from seeking redress for relatively small amounts of money," and thereby to grant the drafting party "virtual immunity from class or representative actions despite their potential merit."³⁰⁷ And could not precisely the same reproach be directed against an arbitration clause that

- is instead "silent" with respect to class-wide proceedings,

- but which may be construed (and which the drafting party urges *must* be construed) to withhold authorization for such

proceedings, under a

- default rule regime that insists on some affirmative evidence of “consent” -- which would be found lacking here? (This of course is *Stolt-Nielsen*.) What after all is the difference between an arbitration clause that is properly *construed to “mean”* that class-wide proceedings are unauthorized, and one that clearly *tells* us that they are? One would think that a robust state doctrine of “unconscionability” would tend to reach both, and would find no need to distinguish between the unavailability of class procedures when due to “waiver” and when due to “silence.” In neither case, of course, could a state in applying its law actually impose class-wide arbitration;³⁰⁸ in both cases, however, a finding of “unconscionability” would *527 *condition enforcement* of the agreement to arbitrate in the first place on the availability of class-wide proceedings -- that is, would restrict enforcement to cases where the parties had *contracted around* the *Stolt-Nielsen* default.

At the very outset of his opinion in *Concepcion*, Justice Scalia posed the problem in precisely the terms I’ve just suggested: “We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”³⁰⁹ That the answer unsurprisingly turned out to be, “yes it does,” closes the circle that the Court had begun to trace in *Stolt-Nielsen*: The presumed consequence is that the arbitration clause, if invoked by the drafting party, must be enforced as written (or as construed), and that no litigation on the claim may be entertained, class-wide or otherwise.³¹⁰

My treatment of this final case, in comparison to what has gone before, will necessarily be somewhat abbreviated. There are to begin with the constraints of publication. (I appreciate the need to keep the girth of this *Review* issue under some control.) And then, in reading over what has gone before, it seems fairly obvious -- to paraphrase Johnson on *Paradise Lost* -- that no man could wish it longer. Above all, the work of situating these cases within the continuing narrative of our law of arbitration -- purporting solemnly to tease out the underlying principles and meaning and doctrinal implications of a jurisprudence that is so relentlessly result-driven and predictable, so captured by ideology and corporate interest -- begins at this point to seem dispiritingly futile. What is left for us is at best a purely sporting interest in the few open questions remaining to be played out -- but this is speculation about the human comedy rather than anything bearing a resemblance to scholarship.

*528 A. “Unconscionability” and § 2

The “rigorous” enforcement of arbitration agreements mandated by federal law³¹¹ is qualified only by the celebrated “savings clause” of § 2.³¹² The Supreme Court is often quoted to the effect that the “contract” “grounds” “saved” in § 2 are necessarily matters of state law.³¹³ But the Court’s casual references to this effect have been treated far too uncritically:³¹⁴ Few people, I gather, have paused to wonder whether they envisage a state law that is to be applied *ex proprio vigore* -- with some regulatory force of its own -- or instead one that is adopted, in Holmes’ *529 quotable phrase, merely as a “benevolent gratuity.”³¹⁵ The latter view is the correct one: Federal courts after all commonly choose to “incorporate” -- or “borrow” -- or “absorb” -- rules of state law, and it would be natural to do so if only as a matter of convenience, avoiding the burden of having to specially fashion a newly minted federal common law of private agreement. (Given the substantial homogeneity of American contract law across state boundaries, borrowing is hardly likely to impair the uniformity in application of the federal statute.)³¹⁶ But federal substantive law it remains; the “savings clause” merely qualifies and gives full meaning to a federal right; identifying what will best serve federal policy is essential simply in order to spin out the dimensions of this right -- which remains a matter of national concern “precisely because Congress has dealt with it.”³¹⁷ And of course, any exercise in federal common-law “lawmaking” will *530 in any event necessarily, inextricably, be bound up with the mundane question of the proper interpretation of the statutory text itself -- any difference between the two is at best a difference of degree.³¹⁸

Bearing all this in mind allows us to have a somewhat better handle on the extent of the tolerance granted to state courts in arbitration matters. Despite a traditional tendency to abstraction,³¹⁹ “contract doctrine” can only be understood in the light of the concrete question posed in a particular case -- that is, it is necessarily sensitive to the context of the transaction. Most state regulation dealing with contracts “pertain[s] to a class that is not entirely universal.”³²⁰ For this reason any insistence that state law can only be justified on the basis of disembodied “general contract law principles”³²¹ applicable to “any other contract” (or to “all other contracts”) would be pointlessly rigid.³²²

*531 Here are some obvious examples: A printed form contract that is “absolutely illegible to the naked eye,” might, on that ground alone, be deemed by a state court to be “inequitable” and thus unenforceable by “common law standards.”³²³ Alternatively, a state legislature might respond to this concern by reshaping the common-law standard into a tighter rule -- one that is:

- limited to the particular evil perceived -- the danger of surprise to consumers who enter into contracts of adhesion, and
- intended to give fair notice to draftsmen by specifying precisely which format and font will be deemed adequate to protect the weaker party.³²⁴

And then, a consumer may attempt to avoid an arbitration agreement by alleging that it did not comply with the statutory mandate. While at a high-enough level of abstraction the original “ground” for “revocation” is “generally applicable,” the sweep of the statute is certainly not-but instead necessarily takes its meaning from an application in a specific context. Still, I find it hard to believe that any federal policy is implicated here that requires state consumer-protection measures to be aborted before reaching this particular case.

The same principles remain in play when a court is asked to look more closely and directly at the nature of the arbitration clause itself. A nice illustration is the classic Contract-law question whether, in the “battle of the forms,” a term in a nonconforming “acceptance” has become part of “a contract.” It will not, the UCC tells us, if it constitutes a “material alteration.”³²⁵ Does that constitute a “general” ground for the revocation of “any” contract? Well, perhaps not: It is of course generally applicable across the wide expanse of Sales law -- but it is not to be *532 found in the common law (where in fact a stringent “mirror-image rule” would deny the formation of any contract at all.)³²⁶ But let’s put that aside -- and suppose that we are indeed dealing here with “general principles.”³²⁷ Some provisions appearing for the first time in the “acceptance” will be held to be “material alterations”; others will not: So we have to go on to determine whether an *arbitration clause in particular* has failed to become part of “the contract.” The “rule,” in other words, can only take its meaning in practical application, in real life, from the fact that the non-conforming clause purports to impose the obligation to arbitrate. So the doctrinal inquiry becomes, “whether under these circumstances the addition of an arbitration clause has caused ‘unreasonable surprise’ or ‘hardship’ to the offeror?” And that in turn will depend on whether arbitration would be outside the scope of “trade practice” or beyond what appears to be “customary or reasonable.”³²⁸ Arbitration is thus necessarily called into question whenever we proceed, not at the very highest possible level of abstraction, but at this lower level of generality -- which may be “arbitration specific,” but *which is precisely where actual contract litigation takes place*.

And precisely the same point can be made about the claims of “unconscionability” at the heart of *Concepcion*. “Unconscionability” after all is nothing more than a doctrinal tool for policing those instances of contractual abuse that cannot readily be shoehorned into the time-honored writs of fraud and duress: It broadens out and reformulates the familiar “grounds” -- sensitive to precisely the same concerns, but without all the baggage that has accompanied *533 them.³²⁹ (That the muddiness of the concept may encourage state courts to resort to it strategically, in the interest of avoidance, certainly triggers a heightened federal interest³³⁰ -- but hardly eliminates the need to rein in a draftsman’s overreaching.)

*534 Now it is in the very nature of the policies animating “unconscionability” that they stand ready in theory to “apply to a wide variety of types of conduct.”³³¹ But -- once again: Bringing them to bear in litigation in any concrete case requires an appreciation of context; the ultimate determination is made in the light of the “setting, purpose, and effect” of the contractual term being challenged.³³² So in arbitration cases claims of “unconscionability” are naturally likely to be grounded in “concerns about specific substantive terms of the arbitration agreement” -- with the goal of having the court declare abusive certain aspects of arbitral decisionmaking that necessarily have no counterpart in “contracts generally.”³³³ But this shouldn’t be particularly surprising, nor should it in any way affect the preemption analysis. Consider, for example, that challenges to contractual terms that provide for forfeiture, or that deal with the calculation of interest in a hidden and unusual and burdensome fashion, may also be said in some sense to be “specific” to credit agreements -- and to touch no other form of transaction. There, as here, a “doctrine” of “unconscionability” -- when framed at the usual high level of generality -- is designed to stand in as shorthand for the policing of “oppression” and “surprise.” But it can only find its outlet in places where “oppression” and “surprise” happen to be lurking.

An alternative, and particularly attractive, vision of the “savings clause” of § 2 was evoked by Justice Breyer in dissent: California’s *Discover Bank* rule of “unconscionability” did not perhaps apply to “any” or “all” contracts -- limited as it was to

dispute resolution provisions in contracts of adhesion. But at least, he stressed, it “cannot fairly be characterized as a targeted attack on arbitration,” nor as a “special rule that disfavors arbitration”: On the contrary, it applies “similarly and equally” to both arbitration and litigation, and would render unenforceable contractual provisions barring class-wide procedures “whether arbitration procedures or ordinary judicial procedures are at issue.”³³⁴ Such a standard -- preempting only state law that “discriminates” against arbitration -- is well-rooted in the Court’s earlier jurisprudence,³³⁵ and has the virtue of being functionally *535 linked to the purpose of the federal statute -- to end a common-law rule of “ouster” that would privilege the judicial forum.³³⁶

Framing § 2 in this way does provide a perfectly adequate analytical tool for repressing a good deal of questionable state contract law: For example, a state rule concerned with the “battle of the forms” -- but which

- passes over any fact-based inquiry into party expectation and trade usage,³³⁷
- and instead treats an arbitration clause in a non-conforming “acceptance” as a “*per se*” “material alteration” never able to become part of the contract --
- should certainly be vulnerable to a challenge based on “discriminatory treatment.”³³⁸

*536 Nevertheless an exclusive concern with “discrimination” may prove an unsatisfactory standard with which to assess state regulation that varies a federal scheme crafted by the Supreme Court to privilege (or “promote”) the arbitral process. For example: Barring outright any pre-dispute waiver of the right to a jury trial would self-evidently destroy our entire institution -- no less so for any concurrent effect it might have on bench trials,³³⁹ permitting such waivers but surrounding them with the “safeguards” of adverse presumptions and ungenerous *537 construction and heightened formality,³⁴⁰ might equally have an appearance of evenhandedness -- but, given the decline of the civil jury,³⁴¹ little effect other than to overturn decades of arbitration jurisprudence.³⁴² To my certain knowledge possibilities like these are regularly mooted in and around the committee rooms of state legislatures as a means of cabining arbitration without bringing down the wrath of the Feds. Federal policy is equally being disserved when state regulation, rather than “singling out” arbitration agreements in isolation, instead lumps them together with a shortlist of similarly unthinkable or traditionally suspect or disfavored categories.³⁴³ Nor, finally, would a standard aimed merely *538 at rooting out “discriminatory treatment” take adequate account of the many instances in which a state’s failure to affirmatively *advantage* arbitration agreements in accordance with federal policy is deemed a form of proscribed “hostility.”³⁴⁴

B. “Fundamental Attributes of Arbitration”

Now the Court in *Concepcion* chose not to go down any of these familiar paths -- nor indeed did it show much interest in them. In any event it should be obvious by now that *no* abstract formulation will be able to capture, in any *539 satisfactory way, the ability of state law to permissibly encroach on the federally protected arbitration reserve. It should not be surprising that Justice Scalia’s opinion instead follows a route that closely tracks the course of the Court’s earlier argument in *Stolt-Nielsen* -- thus adopting a rationale closely tailored to the particular problem of class adjudication:³⁴⁵ Class-wide proceedings, the Court holds, is wholly “incompatible” and “inconsistent” with the arbitration process: Therefore to insist on it would “interfere with fundamental attributes of arbitration” -- at least as arbitration was “envisioned by Congress” when the FAA was enacted in 1925.³⁴⁶

Of course, quite different questions are being asked in the two cases: It is one thing to ask (applying § 10) whether arbitrators as “contract readers” are acting within their authority when they construe an agreement to permit them to order class-wide proceedings; it is another to ask (applying § 2) whether state law as the source of contract doctrine may refuse to enforce an arbitration agreement at all unless such procedure is made available. In the former case the trope of “incompatibility” stands in as a surrogate for “failing to honor the supposed expectations of the parties”; in the latter, we know precisely what the contractual expectations were -- and so the trope becomes a surrogate for “excessive state interference with party autonomy.”

Still, they are both of a tale: An answer of “no” to both questions rests on the premise that without manifested consent to the contrary, arbitration is to proceed on a bilateral basis; if arbitrators may not avoid a federal default rule that refuses to presume assent to class-wide proceedings, state courts may not deny a party the right to arbitrate merely on the ground that he has failed to contract around it. The *Concepcion* opinion is filled with the usual rhetoric about the importance of enforcing

private arbitration agreements “according to their terms”³⁴⁷ -- something that can never of course be taken quite literally, as it would foreclose just about any contract-based defense: But what seems determinative here is that neither in *Stolt-Nielsen* nor in *Concepcion* will a decision-maker (whether arbitrator or judge) have any warrant for ignoring -- and still less for routinely setting aside as “unconscionable” -- the federal background rule of intention that is grounded in the usual, familiar, comfortable attributes of bilateral arbitration.

That brings us to the critical point: Once again it is an error to take the Court as having proceeded on the basis that § 2 requires us to demarcate precisely what “arbitration” “really” “is”:³⁴⁸ Definitions are tendentious, and so the enterprise is ***540** ultimately of little interest; lines are drawn, and classifications constructed, not in the abstract but for some instrumental purpose.³⁴⁹ This is (of course) “arbitration” -- for the FAA is unusually capacious. (For example, arbitral mechanisms specified by contract to be entirely “non binding” are regularly and sensibly held to fall within the FAA -- although at the same time of course states may not by law, on their own, deprive awards of any binding effect.)³⁵⁰ A contrary view -- to the effect that after *Concepcion* arbitration under the FAA is “limited” to the form that Congress “envisioned” in 1925 -- might in fact suggest that even consensual class-wide proceedings were entirely outside the protection of the statute.³⁵¹ But I hardly think that *Bazze* has been or will be abrogated quite to that point, and the Court’s continued obsessive insistence on party autonomy cuts precisely in the opposite direction.³⁵²

***541** None of that is necessary to understand *Stolt-Nielsen* and *Concepcion*, which extend only this far: The FAA privileges the modal, the familiar, the historically contingent form of arbitration, against both

- too casual an assumption that the parties have wished to depart from it; and

- too sweeping a state regulation which deems it necessarily unacceptable under local “contract-law” standards.

If what are perceived as the “principal attributes” of arbitration³⁵³ -- the reasons why parties choose to submit themselves to alternative processes -- are called into question either way, the result is not “evenhandedness,” but rather an insistence that arbitration come to resemble some caricature of the very judicial forum that they were trying to escape.

The final strategic move, of course, is to place into this category of “core” qualities -- not only non-issues like the parties’ desire for adjudication by a “single qualified lay judge”³⁵⁴ -- but also their preference for the simplicity of bilateral proceedings: The “efficiency” that is obtained by avoiding the “complexity” of class-wide litigation³⁵⁵ is as always a reliable guide to judging the parties’ presumed intentions,³⁵⁶ and it is equally a guide to what the parties sought through careful drafting to preserve from state interference.³⁵⁷ That “arbitration” can be (and has been) expanded to encompass class-wide proceedings³⁵⁸ is well known ***542** but hardly addresses the central concern -- that where the most-valued characteristics of the process are undermined by arbitral rulings or judicial decisions, corporate users with less reason to resort to arbitration will flee.³⁵⁹

Now when Justice Scalia writes that California’s *Discover Bank* rule impairs the federal statutory policy aimed at “promoting” the arbitral process -- that it would thus “have a substantial deterrent effect on incentives to arbitrate” -- he might generously be taken as referring to all that has gone before.³⁶⁰ But of course, talk of “promotion” and “incentives” serves primarily as transparent code for other, unarticulated concerns. In particular: Recall that as a practical matter ***543** the effect of the *Discover Bank* rule was not that contracting parties would be forced into class arbitration, but rather that they would be forced into class litigation.³⁶¹ By contrast, bilateral arbitration is valued not particularly for its ability to protect corporate users from “complexity” -- or even from “narrow standards of review” -- but above all for its promise to minimize the claim-facilitating and liability effects of all aggregate litigation. That the “promotion” of arbitration is driven by the corporate project to avoid any class exposure at all for individually trivial claims is reasonably clear;³⁶² what else could possibly explain Justice Scalia’s eloquent evocation of “the risk of ‘*in terrorem*’ settlements that class actions entail,” pressuring defendants “faced with even a small chance of a devastating loss” to settle “questionable claims”?³⁶³

To try, then, at the Court’s invitation, to compile a list of all the “fundamental attributes” of arbitration is then just to play a mug’s game; it’s quite clear for the reasons sketched above that bilateral proceedings must be one of them -- and for that matter this may be a class with only one member. But the abstract principle that state law must serve the overriding policy of “promoting,” or at least not “detering,” the “incentive” to arbitrate, is now on the books, and may one day cut deeply -- even in cases that implicate the mandate of § 2 to a considerably lesser degree.³⁶⁴

*544 For the moment the intended reach of the Court's jurisprudence is unclear, and suggestions for evasion, while abundant, reek of desperation.³⁶⁵

Still, here are two.

1. An earnest attempt to mark out the limits and implications and dimensions of the *Conception* holding -- trying "to remain true to the spirit of the opinion" -- strikes me as a largely pointless and dispiriting academic exercise, given the Court's familiar agenda. This first point then merely suggests ways of cabining the holding by effectively immunizing lower-court decisions from review.

The California "*Discover Bank* rule" was drafted broadly, to the point indeed that it almost reads like a legislative decree.³⁶⁶ Further, cases applying it seemed in fact to conflate the "unconscionability" question with broader social concerns raised by class waivers, thereby avoiding *545 completely the usual steep hurdle of demonstrating indecent conduct towards a particular plaintiff.³⁶⁷ A thought experiment: Imagine a state statute that closely tracked FINRA arbitration rules and flatly excluded any "class action claim" brought by a consumer from the arbitration system.³⁶⁸ Much sound policy might in fact counsel in favor of legislation along these lines in the case of small consumer claims, but under our present statutory scheme it would inescapably be considered a form of state overreaching: In its scope the *Discover Bank* jurisprudence, I would suggest, does not seem too far removed from this example.³⁶⁹

While the Supreme Court's holding was not framed to take account of this aspect of the *Discover Bank* rule, I should think that state contract-law decisions which by contrast are tightly and narrowly framed (and which *546 don't at the same time trigger the Court's visceral aversion to class litigation) should be more likely to escape review. For this reason it may, at least for the moment, be a bit premature to suggest that as applied to arbitration agreements there is nothing much left of the doctrine of unconscionability.³⁷⁰

For example, I should think it remains open to a plaintiff to argue that, given his particular financial condition, the costs of initiating an arbitration are prohibitive -- to the point indeed of restricting his ability to pursue the claim.³⁷¹ Similarly, a state rule that conditions enforcement of *547 arbitration agreements on the availability of the full panoply of pre-trial discovery might well be unacceptable -- although it applies notionally to litigation as well as to arbitration, it would nonetheless seem to have a "disproportionate impact" on the arbitral process.³⁷² But at the same time, a state court could hold that an employee who seeks to advance a fact-based discrimination claim may not by contract be denied a fair opportunity to marshal the evidence necessary to his case.³⁷³ Finally, even before *Conception*, state legislation that invalidates agreements requiring an out-of-state forum was (although also facially non-discriminatory) frequently held to be preempted.³⁷⁴ But at the same time, *548 the invalidity of such prophylactic rules need not preclude a court's attention to individual hardship, permitting a tailored effort that is aimed at minimizing interference both with federal policy and with the concerns of private autonomy.³⁷⁵

2. Here is one further, and most curious twist:

In discussing possible responses by the Supreme Court to the "unconscionability game" played by recalcitrant state courts -- and "gaz[ing] into the crystal certiorari ball" -- Professor Bruhl presciently suggested some years ago that "taking a case that comes from the federal courts rather than from the state courts, even though the applicable law is the same (e.g., a Ninth Circuit case applying California unconscionability law), would ... lower the federalism stakes."³⁷⁶ *Conception* was precisely such a case arising out of the federal courts in the Ninth Circuit. But the Court there did not say that the California rule was an undesirable candidate for adoption by federal courts as part of their own common law: Rather the state rule was "preempted by the FAA," and Justice Scalia's opinion is replete with warnings as to what "state courts" can and cannot do.³⁷⁷

But recall that the Court's 5-4 majority relied on the concurring vote of Justice Thomas. Earlier I referred to Justice Thomas' singular and dogged insistence that the FAA "does not apply to proceedings in state courts."³⁷⁸ So assuming the *549 current ideological division of the Court remains constant, one might wonder about the fate of a *Conception*-clone arising out of a state-court system.³⁷⁹ For the foreseeable future state courts are in any event likely to consider themselves bound by *Conception*, but accepting cert for full review could perhaps reflect a mischievous or malicious attempt on the part of the liberal wing to compel Justice Thomas to choose between his two rigid *a priors*, that of federalism and that of market capitalism.³⁸⁰ One of these will presumably bend, while we observe with bemusement.³⁸¹

*550 Still it should be reasonably obvious that all of this is something of a sideshow, and none of it is particularly edifying. Throughout the “trilogy” we have seen much familiar learning yoked to the service of a market-driven political agenda, in the process often becoming warped and almost unrecognizable. Apparently it is now well beyond the power of arbitrators to hold that “classwide proceedings are permitted,” at least without some pretty special authorization (*Stolt-Nielsen*) -- while it is well beyond the power of *courts* to hold that they *must be* -- certainly not when the parties have agreed to an arbitral determination (*Rent-A-Center*), and even when they haven’t (*Conception*). With the inescapable conclusion that arbitration has now become the cat’s paw of ideology, whatever one can possibly spin out of all this in the way of “doctrine” begins to seem increasingly pointless; as throughout the Court’s recent jurisprudence, we are clearly quite far here from anything that bears a recognizable resemblance to any neutral and informed process of adjudication.

Footnotes

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I am extremely grateful to Bob Bone, Chris Drahozal, Rusty Park, Linda Silberman, and Jay Westbrook for their kindness in agreeing to read through an earlier draft and in sharing their reactions, insights and suggestions.
- ¹ See Alan Scott Rau, [Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions \[hereinafter Rau, “Separability”\], 14 AM. REV. INT’L ARB. 1, 100 \(2003\)](#) (“The October 2002 Term Trilogy”). For a still earlier period, see also Linda R. Hirshman, [The Second Arbitration Trilogy: The Federalization of Arbitration Law, 71 VA. L. REV. 1305 \(1985\)](#); Thomas E. Carbonneau, *Beyond Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration*, 6 AM. REV. INT’L ARB. 1 (1995).
- ² [Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S.Ct. 1758 \(2010\)](#).
- ³ [Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772 \(2010\)](#).
- ⁴ [AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 \(2011\)](#).
- ⁵ Commonly attributed to Miles Davis.
- ⁶ [Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 \(2002\)](#).
- ⁷ [Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 \(2003\)](#).
- ⁸ [PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 \(2003\)](#).
- ⁹ See generally Rau, “Separability,” supra note 1, at 106-08.
- ¹⁰ See, e.g., William W. Park, *The Contours of Arbitral Jurisdiction: A Tale of Two Cases*, INT’L ARB. NEWS (Summer 2003) at 2, 5 (in *PacifiCare* “the Court gave the arbitrators the power to determine their own jurisdiction by interpreting the meaning of ‘punitive damages’ as used in the agreement”); [Bazzle, 539 U.S. at 456-57](#) (Rehnquist, C.J., dissenting) (“[j]ust as fundamental to the agreement of the parties as *what* is submitted to the arbitrator is to *whom* it is submitted”) (emphasis in original).
- ¹¹ See [First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 \(1995\)](#); Alan Scott Rau, [“The Arbitrability Question Itself,” 10 AM. REV. INT’L ARB. 287, 307-08 \(1999\)](#) [hereinafter Rau, “Arbitrability”].

- ¹² For example, in *Howsam*, the parties may well have agreed explicitly not to arbitrate untimely claims -- but that is not at all the same thing as saying that they have agreed not to arbitrate disputes over timeliness. See Rau, "*Arbitrability*," *supra* note 11, at 330; see also *Smeaton Hanscomb & Co. Ltd. v. Sassoon I. Setty, Son & Co.*, [1953] 1 W.L.R. 1468, 1471-72 (Q.B. 1953) ("if I have to choose between construing a clause which provides that any claim must be made within 14 days either as a clause that bars the claim altogether or as a clause that goes to the jurisdiction of the arbitrator, I should choose the former; for I can see no reason for holding that a clause which is in form a limitation clause should be construed so as to affect the authority of an arbitrator or the validity of his appointment").
- ¹³ See *Howsam*, 537 U.S. at 86 ("parties to an arbitration contract would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters"); see also *Pacificare Health Systems*, 538 U.S. at 407 n.2 (the phrase, "a question of arbitrability" is only "applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter," but "the preliminary question whether the remedial limitations at issue here prohibit an award of RICO treble damages is not a question of arbitrability").
- ¹⁴ See *Bazzele*, 539 U.S. at 451-52 (a dispute about what the arbitration clause "means (*i.e.*, whether it forbids the use of class arbitration procedures)" is a dispute "relating to this contract" and "hence the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question").
- ¹⁵ See *Howsam*, 537 U.S. at 85 ("the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding.").
- ¹⁶ *Bazzele*, 539 U.S. at 447 (emphasis added).
- ¹⁷ In a class proceeding brought by the Bazzles, the arbitrator had awarded almost \$11 million in statutory penalties, and an additional \$3.6 million in attorneys' fees, for a lender's failure in violation of state law to notify the borrower of his right to select his own attorney or insurance agent. In a related proceeding the same arbitrator had awarded \$9.2 million in statutory penalties, and an additional \$3 million in attorneys' fees, to other claimants. There were no "actual damages." *Bazzele v. Green Tree Financial Corp.*, 569 S.E.2d 349 (S.C. 2002).
- ¹⁸ *Bazzele*, 569 S.E.2d at 351, 359 (italics in original).
- ¹⁹ Cf. UCC § 1-303 cmt. 3 ("the commercial meaning of the agreement that the parties have made"; usage of trade, as well as the parties' "course of performance" and "course of dealing," "furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding").
- ²⁰ *Bazzele*, 569 S.E.2d at 358, 360.
- ²¹ *Id.* at 360. The court was not unusual in claiming to reach this conclusion "under general principles of contract interpretation." *Id.* But on the common conflation of "interpretation" and "construction," see text accompanying note 117 *infra*. Further on the *contra proferentem* trope, see text accompanying notes 145 ff. *infra*.
- ²² Lower federal cases refusing to order consolidation of related arbitrations could therefore be deemed not particularly relevant. Whether § 4 of the FAA even "applies in state courts" -- despite the "plain meaning of the statute" suggesting otherwise -- was seen as "debatable." This is, however -- despite the coyness of the Supreme Court on the subject -- really a "debate" that should have been laid to rest long ago. See Alan Scott Rau, *The UNCITRAL Model Law in State and Federal Courts: The Case of "Waiver"*, 6 AM. REV. INT'L ARB. 223, 243-46 (1995) [hereinafter Rau, "*Waiver*"] (that § 4 appears to speak only in terms of

proceedings in a federal district court “is both an obvious and an uninteresting point”); Alan Scott Rau, *Does State Arbitration Law Matter at All?*, in ADR & THE LAW: DEVELOPMENTS IN ADR: 1998 at 208, 210-11 (1999) [hereinafter Rau, *State Arbitration Law*] (§§ 3 and 4 may “call on states to align their procedures to some extent with the demands of federal arbitration policy”).

²³ See *Bazzele*, 539 U.S. at 450; Brief for Petitioner [Green Tree], 2003 WL 721716 at *42-*43 (“the unlikely conclusion that the parties authorized class-action arbitration here is foreclosed by the language of their arbitration agreements”); Final Brief of Appellant [Green Tree Financial Corp.], in the Supreme Court of South Carolina, at 17 (“the fact that the clause limits the scope of arbitrable issues to ‘disputes, claims or controversies arising from or relating to *this contract*’ evinces an intent that *only* disputes concerning the contract to which the named plaintiffs were a party, *not* the contracts of absent third parties, were to be arbitrated”) (emphasis in the original). This is of course precisely the tack taken in Chief Justice Rehnquist’s dissent, see *Bazzele*, 539 U.S. at 455, 458-60 (Rehnquist, C.J., dissenting) (“the Supreme Court of South Carolina imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator would be chosen”; since its holding “contravenes the terms of the contracts [it] is therefore preempted by the FAA”).

²⁴ See *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, Clause Construction Hearing, Joint Appendix, 2009 WL 2777896 at *117a (attorney for claimant: prior arbitration cases “relied on a notion of a broad clause that does not expressly forbid class arbitration, that’s permitting class arbitrations to move forward”); *Stolt-Nielsen*, 130 S.Ct. at 1772 (before the arbitral tribunal, claimant “argue[d] that *Bazzele* requires clear language that *forbids* class arbitration in order to bar a class action”) (emphasis added).

²⁵ E.g., *Flaxman v. Terminix, Inc.*, Partial Final Clause Construction Award, AAA No. 11 434 00701 07 (2008) at n.6 (“although it does not create an automatic presumption in favor of allowing class claims when the agreement is silent,” nevertheless, “notably,” the plurality in *Bazzele* “does consistently define the issue as whether there is any class action prohibition”); see also *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 89-90 (arbitral tribunal ordered class-wide proceedings after noting that respondent “had been unable to cite any arbitration decision under [AAA Rules] in which contractual silence had been construed to prohibit class arbitration”).

²⁶ Cf. William G. Whitehill, *Class Actions and Arbitration Murky Waters*, 4 WORLD ARB. & MED. REV. 1, 9-10 (2010) (the arbitrators in *Stolt-Nielsen* decided to proceed with a class arbitration “because the [respondent’s] evidence did not *preclude* class arbitration,” and so in effect “the Panel adopted *Bazzele*’s approach of placing on the party opposing class treatment the burden to establish that the arbitration agreement affirmatively prohibits class arbitration”) (emphasis in original); see also *Jock v. Sterling Jewelers, Inc.*, 725 F. Supp. 2d 444, 448 (S.D.N.Y. 2010) (Arbitrator Roberts “devoted her analysis to determining whether there was any indication that the parties intended to preclude class arbitration, and ultimately concluded that the agreements ‘do not prohibit’ class arbitration”).

²⁷ Cf. *Green Tree Financial Corp. v. Bazzele*, Brief for Respondents [Bazzles], 2003 WL 1701523 at *28, *32, *38 (“although another state might apply a different default rule,” Green Tree’s own choice-of-law provision “incorporates the South Carolina default rule permitting class arbitration”).

²⁸ *Bazzele*, 539 U.S. at 450-51.

²⁹ *Id.* at 453-54.

³⁰ *Id.* at 452 (emphasis in original).

³¹ The claimants -- who had prevailed in seeking class-wide arbitration -- would certainly have had no reason to urge vacatur and a remand to the arbitrators: Indeed the thrust of their argument was that the decision to order class-wide proceedings *had already been made by the arbitrators*. See Oral Argument, *Green Tree Financial Corp. v. Bazzele*, 2003 WL 1989562 at *37-38 (Justice Breyer suggests that “the correct resolution” is to “send it back to the arbitrator for that determination, not influenced by the South Carolina opinion,” but counsel for the claimants demurs, “because the arbitrator already did look at this clause and decided that the language of the arbitration agreement allowed him to decide”); Brief for Respondents [Bazzles], *supra* note 27, 2003 WL 1701523

at *44 (“there is no reason ... to conclude that the arbitrator failed to appreciate that the decision was his to make”).

For its part, the defendant wouldn't seem to have had much to gain by a remand to the arbitrators either: If anything, it took the position that the decision should be for the court -- see Oral Argument at *20 (counsel for Green Tree: “whether the arbitrator has the authority to resolve the rights of unnamed third parties is not a question for the arbitrator to decide. That's a question for the court to decide”); Brief for Respondents [Bazzles], *supra* note 27, 2003 WL 1701523 at *44-*45 (remand to the arbitrator was “a remedy that [Green Tree] never sought here, could not now seek, and in any event does not want”); *Bazzle*, 539 U.S. at 455 (Stevens, J., concurring in the judgment) (defendant Green Tree “merely challenged the merits of the [state court] decision without claiming that it was made by the wrong decisionmaker”).

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For the dissent, though, the decision to order class-wide proceedings could not, under the FAA, be a decision for the arbitrator -- for “the parties’ agreement as to how the arbitrator should be selected is [akin] to the agreement as to what shall be arbitrated, a question for the courts under *First Options*.” Nor could it be a decision for the state courts *under their own law* -- for here at least the default rule adopted by the South Carolina court “contravenes the terms of the contracts,” “imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator would be chosen,” and thus failed to enforce the agreement “according to [its] terms” in violation of § 4 of the federal statute. *Bazzle*, 539 U.S. at 455-57, 459-60.

Whatever the extent of disagreement between the plurality and the dissent, there was thus a solid majority for the proposition that the FAA controlled the question of class-wide proceedings. Chief Justice Rehnquist's dissent was joined by Justices O'Connor and Kennedy; only Justice Thomas -- whose singular inability to reconcile himself to *Southland v. Keating* rendered him once again incapable of making any meaningful contribution to the discussion -- and Justice Stevens, were outliers. What we have here, then, is at least an oblique recognition that as a practical matter the mandate of § 4 of the federal statute must indeed be binding in state courts; see also note 22 *supra*. All this might seem “puzzling” indeed to scholars of constitutional law; cf. Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1956 (2003) (“Whether the state court correctly determined [the allocation of power between courts and arbitrators] is an issue of state contract law only, and one that is not antecedent to any federal claim, and thus, standard application of the adequate nonfederal ground doctrine should have barred review. Or is the Court implicitly ‘federalizing’ arbitration law?”) -- but not to those who have been following the course of federal imperialism spun out over the years from the terms of the FAA.

It is striking that the dissent envisaged the use of § 4 not merely to reverse past hostility to arbitration -- that is, to ensure that a court will compel arbitration where a contract so provides; for Chief Justice Rehnquist it may equally be deployed negatively, to ensure that courts do not presume to “improve” the parties’ agreement by ordering arbitration *otherwise than in accordance with their expressed wishes*. This same theme assumed considerably greater importance in the Court's decision in *Stolt-Nielsen* a few years later; see text accompanying notes 171-72 *infra*.

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In re *Standard Bag Corp. and Paper Bag, Novelty, Mounting, Finishing and Display Workers Union*, 45 Lab. Arb. 1149 (1965). See also JAN PAULSSON, THE IDEA OF ARBITRATION (forthcoming 2012) at Ch. 3 (“Inferences and counter-presumptions may also tip the scales, depending on the prior dealings of the parties, settled and notorious industry practices, and the like”); Lon Fuller, *Collective Bargaining and the Arbitrator*, 1963 WISC. L. REV. 3, 11-12, 17 (the problems in “complicated commercial litigation” “are not unlike those encountered in dealing with labor agreements”; both may involve “complex procedures that vary from industry to industry, from plant to plant, from department to department”; “though the terms of [its] vocabulary often seem simple and familiar, their true meaning can be understood only when they are seen as parts of a larger system of practice”). The role of context in helping to determine the “framework of common understanding” assumed greater importance in the later *Stolt-Nielsen* litigation. See *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 435 F. Supp. 2d 382, 385-86 (S.D.N.Y. 2006) (“in the maritime area ... the interpretation of contracts -- and especially charter party agreements -- is very much dictated by custom and usage,” and “experts in international maritime arbitrations [testified] to the effect that sophisticated, multinational commercial parties ... would never intend that the arbitration clauses would permit a class arbitration”), *rev'd*, 548 F.3d 85, 97-98 (2d Cir. 2008) (“custom and usage is more of a guide than a rule”); see also Clause Construction Hearing, Joint Appendix, 2009 WL 2777896 at *91a-*92a (attorney for respondent; “we’re talking about recognizing how the industry works, how the parties do business”; “they arbitrate all their disputes in an individual arbitration, [they] have always done that, that’s what they provide for, it’s what they expect”).

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See UCC § 1-201(3) (“agreement” is defined as “the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade”). See also Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 782, 785 (1999) (“the Code recognizes that the rights and duties of contracting parties can be derived not solely from specified authoritative static forms, most notably the text of the bargain, but also from the dynamic, legally unformulated, fact patterns of common life”; nevertheless Ben-Shahar suggests that “the type of flexibility that the Code potentially promotes” will often, because of factors like imperfect information and the randomness and imprecision of adjudication, “make contractual parties worse off”).

³⁵ This is a familiar term in labor arbitration, where it is common to say that the arbitrator serves as “the parties’ officially designated ‘reader’ of the contract. He (or she) is their joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement,” Theodore St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140, 1142 (1977).

³⁶ Hence Justice Breyer’s stress on the fact that the arbitrators would be particularly “well situated to answer” the question posed, [539 U.S. at 453](#). Hence above all his invocation of his own earlier opinion in *First Options* -- the true teaching of which is that *once a matter has been delegated to the arbitrators by agreement of the parties*, “courts would then be expected to defer prospectively, by refusing to rule on an issue that was entrusted to arbitral decisionmaking, and would be expected as well to defer *after the fact*, by limiting their review to narrow statutory grounds.” See Rau, “Arbitrability,” *supra* note 11, at 293. Perhaps, though, remand would not have been appropriate in the first place if the presence of a contractual prohibition of class-wide proceedings was “clear.” Cf. [Bazzele](#), [539 U.S. at 451](#) (“We do not believe, however, that the contract’s language is as clear as the Chief Justice believes”).

³⁷ Cf. David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, U. WISC. LEGAL STUDIES RESEARCH SERIES PAPER NO. 1153 (2011), available at <http://ssrn.com/abstract=1761675>, at p. 19 n.62. Some understatement here: “It seems probable at this juncture that the arbitrator would construe the contract to allow class actions, since the alternative would entail vacating his own class arbitration awards.”

No third alternative could have been imagined: That is, it could not have been supposed that there would be some sort of bifurcated proceeding, in which the arbitrators must first decide whether the agreement is notionally “silent” -- and if the answer is “yes,” then their work of interpretation would be done, returning the legal implications of that conclusion, the question of the appropriate default rule, to the courts. Such a model would be at the same time unworkable, incoherent and naive.

³⁸ The only supporting reference was a citation to *Volt*, presumably invoked based on the contract’s South Carolina choice-of-law clause. See [Bazzele](#), [539 U.S. at 454-55](#); cf. [Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.](#), [489 U.S. 468](#) (1989). The argument is perhaps undercut by the express provision in the *Bazzele* arbitration clause that it was to be “governed by” the FAA -- although I suppose one could say, in response, that under *Volt* it is after all *only the otherwise-applicable federal law* that permits parties to choose state law in the first place.

³⁹ See [Bazzele](#), [539 U.S. at 454-55](#).

⁴⁰ For the marginalization of *Bazzele* as precedent in the later *Stolt-Nielsen* decision, see note 63 *infra*.

⁴¹ Cf. S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT’L L. 1017, 1022-23 (2009) (where an international class arbitration is seated in the U.S., “because the United States has already judicially approved of the class arbitration mechanism,” a losing respondent will not be able to argue that the class-wide proceeding is “presumptively disfavored as a matter of international law or policy”); [Shroyer v. New Cingular Wireless Services, Inc.](#), 498 F.3d 976, 991, 992 (9th. Cir. 2007) (“we read [*Bazzele*] as an implicit endorsement by a majority of the Court of class arbitration procedures as consistent with the Federal Arbitration Act”; since “class arbitrations further the FAA’s purpose of encouraging alternative dispute resolution,” our holding that a waiver of class proceedings is unconscionable cannot in consequence be preempted as in conflict with federal policy).

⁴² See [Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.](#), Brief of AAA as Amicus Curiae in Support of Neither Party, 2009 WL 2896309 at *9.

⁴³ The AAA’s searchable class arbitration of cases “being administered” by the institution is available at <http://adr.org/sp.asp?id=25562>. As of October 1, 2011, it included 301 cases, including cases that had been settled, withdrawn, or dismissed, and awards that had been vacated. (Only eight of these had been filed after the Court’s decision in *Stolt-Nielsen*).

⁴⁴ These supplementary class rules are to apply to any contract calling for arbitration under any body of AAA rules (although the AAA will not “administer class arbitrations where the underlying arbitration agreement explicitly *precludes* class procedures,” Commentary to the American Arbitration Association’s Class Arbitrations Policy, Feb. 18, 2005).

The AAA's "class rules" caution that "[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis." R. 3. In short, mere agreement to the rules does not in itself amount to an "agreement to classwide arbitration" -- is not even probative of any such agreement; there is a simple grant of authority to the arbitrators, but this does not in itself amount to expressing a preference for arbitral judgment to be exercised in any particular way.

Still, the gravitational pull of these rules can be very intense indeed, and hard to resist. *Cf.* Strong, *supra* note 41, at 1073-74. Professor Strong criticizes the AAA rules for "apply[ing] the concept of implied consent to allow retroactive application" to parties whose contract may "dat[e] back to the 1970's or 1980's when the rules were "not even in existence" -- resulting in unfair "surprise." *Bazze* itself of course is a case where class-wide rules did not exist at the time of contracting. But consider for a moment the implications of the suggestion that the "non-existence" of the rules would tend to show that class-wide proceedings could not have been within the parties' "contemplation" -- and thus not within the ambit of their consent. Is there not, logically, a negative implication -- that if the rules *had indeed existed* at the time the contract was entered into, we would then be warranted in drawing the opposite conclusion -- that there had in fact been "consent"? And isn't precisely the same problem lurking in the suggestion that "implied consent" might also be found merely on the basis of an agreement to arbitrate "in" a particular state -- a state whose arbitration law happens to contemplate the possibility that class-wide proceedings might be ordered? *Cf. id.* at 1062-67 & n.209 ("implied consent can be demonstrated through the parties' choice of procedural rules and laws, some of which may include methods of dealing with multi-party situations"; "if the arbitration agreement points strongly to seating the proceeding in a jurisdiction (such as the U.S.) that recognizes arbitrators' authority to order classwide proceedings, then the parties may be said to have implicitly consented to classwide proceedings").

⁴⁵ [Bazze](#), Oral Argument, *supra* note 31, 2003 WL 1989562 at *55; see also [Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.](#), Oral Argument, 2009 WL 4662509 at *57 (Justice Ginsburg: "you win this case, but then all the future AnimalFeeds you lose because they will just put in the arbitration agreement you can't proceed on class").

⁴⁶ [Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.](#), Brief for Petitioners, 2009 WL 2809359 at *7.

⁴⁷ However, the agreement in *Bazze* did call for arbitration of "all disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract ..." By contrast, one of the standard maritime arbitration clauses in issue in *Stolt-Nielsen* was perhaps somewhat narrower -- calling for arbitration only of "any dispute arising from the making, performance or termination of this Charter Party." Thankfully the parties' stipulation made it unnecessary to dwell on the possible significance of this semantic variation, *cf.* [Stolt-Nielsen](#), Oral Argument, *supra* note 45, 2009 WL 4662509 at *7 (Justice Breyer: "a class-action determination does relate to. Maybe it doesn't arise out of, okay? That's an argument").

⁴⁸ The arbitrators claimed to believe that the resolution of this issue was "controlled by the Supreme Court's decision in [*Bazze*]" -- but obviously this is incorrect; however receptive to the notion of class-wide proceedings, and however deferential to arbitral competence, the Court there provided no guidance at all with respect to how an arbitral tribunal should proceed. See [Stolt-Nielsen](#), 435 F. Supp. 2d at 384.

⁴⁹ Only Justice Ginsburg, dissenting in the Supreme Court, questioned whether judicial review of this "abstract and highly interlocutory" arbitral order was proper under the FA [A. Stolt-Nielsen](#), 130 S.Ct. at 1778-79. After all, the "clause construction award" did not actually certify a class, nor did it decide whether the arbitration "should proceed as a class arbitration" -- that is an issue which under the AAA rules is subject to judicial review at a still later stage, after a "class determination award." R.4, R.5. The Court majority, however, seemed eager not to let pass this occasion to strike down the class proceeding, and brushed aside the objection -- merely rejecting any notion that review was "constitutionally unripe" -- something that falls rather short of a statutory analysis. See *id.* at 1767 n.2.

Note that the Court's decision in *Hall Street* should really have nothing to say about the timeliness of judicial review of a clause construction award under AAA rules -- or at the very least, any attempts to extend the reach of that benighted decision should be stoutly resisted. The parties' agreement did not purport to "expand the grounds" for judicial review, nor did it purport to "gain instant review" by bypassing the usual jurisdictional restrictions on judicial action; *cf. id.* at 1779 (Ginsburg, J., dissenting). The AAA rules merely instruct the arbitrators to "stay" their own proceedings in order to enable parties to seek *whatever judicial review state or federal legislation would otherwise permit*. On that subject, there is abundant, if conflicting, authority addressing whether arbitral orders -- especially where designated as "awards" -- can be confirmed or vacated under FAA §§ 9 or 10, even before the entire case has been concluded. On review of partial awards of liability only, see, e.g., [Hart Surgical, Inc. v. Ultracision, Inc.](#), 244 F.3d 231 (1st Cir. 2001) (parties agreed to bifurcate the arbitration into liability and damages phases; held, arbitral finding that the respondent had wrongfully terminated the agreement constituted a final partial award reviewable by the district court);

[Andrea Doreen, Ltd. v. Building Material Local Union 282](#), 250 F. Supp. 2d 107 (E.D.N.Y. 2003) (“there is nothing in the record that even remotely suggests that the parties and the arbitrator believed that the arbitrator’s decision, on liability would be anything less than final”; held, liability award “can be confirmed notwithstanding the absence of an award that finally disposes of the remedy submitted to arbitration”). At the opposite extreme, in the realm of pure “interlocutory orders,” there are cases like [Aerojet General Corp. v. American Arbitration Ass’n](#), 478 F.2d 248 (9th Cir. 1973) (AAA had determined that arbitration should be held in New York; held, “judicial review [of a ruling setting the place for arbitration] prior to the rendition of a final arbitration award should be indulged, if at all, only in the most extreme cases”).

The provision in the AAA rules envisaging judicial review of clause construction awards had been carefully “crafted [in reliance on] case law that permitted courts to confirm partial final arbitration awards under certain circumstances,” see Brief of AAA as Amicus Curiae, [supra](#) note 42, 2009 WL 2896309 at *16. But see [Dealer Computer Services, Inc. v. Dub Herring Ford](#), 547 F.3d 558 (6th Cir. 2008) (motion to vacate clause construction award “remains unripe because the AAA panel’s ruling did not conclusively determine that Dealers’ claims *should* proceed as a class arbitration,” and “given the significant hurdles posed” by the rules, “it remains far from certain that the arbitration panel will certify Dealers’ claims for class arbitration”).

⁵⁰ What can this be taken to mean? At bottom, the district court holding seemed to rest on one of two claims -- both hollow, and both exploded. Perhaps the court was of the impression that

- an award could be vacated simply because the arbitrator had disregarded some clearly applicable principle of contract construction? See [Stolt-Nielsen](#), 435 F. Supp. 2d at 385-86 (“in the maritime area,” “the interpretation of contracts -- and especially charter party agreements -- is very much dictated by custom and usage”). But see Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L.J. 449, 527-30 (2005) [hereinafter Rau, *Culture*] (criticizing as “simply inadmissible” the notion that “manifest disregard” can be grounded in a claim that the arbitrators “have ignored mere suppletive rules, or ‘gap-fillers’”; for whatever “the law” may presume, the parties themselves, or their designated agents, “can adjust outcomes, and define duties differently”). Or perhaps the court was of the view that

- the award could be vacated because the arbitrator had disregarded evidence with respect to the content of the prevailing custom and usage? See [Stolt-Nielsen](#), 435 F. Supp. 2d at 387 n.3 (“silence” “simply opens the door to extrinsic evidence, which here strongly supports Stolt’s position”). But see Rau, *Culture*, 40 TEX. INT’L L. J. at 526 (even in the Second Circuit the notion of “manifest disregard of the evidence” is “now treated as a mere sport in the law, having joined the choir invisible of discarded conceits”).

⁵¹ See Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT’L ARB. 469, 498-501 (2006) (on closer examination one sees that the entire category is “essentially irrelevant”).

⁵² [Stolt-Nielsen S.A.](#), 548 F.3d at 98.

Nor could the court find any state or federal maritime “rule of construction” that “clearly governs” the issue here -- that is, which governs whether a failure to address the question of class-wide arbitrations should be taken to be probative of an intent not to *allow* them, or of an intent not to *prohibit* them. *Id.* at 99. By contrast, as we have seen, a “rule of construction” with respect to this issue was precisely what the South Carolina courts had found and applied in *Bazzle* (although only Justices Stevens and Thomas thought that deference to this rule was necessary); see text accompanying notes 21-22, and note 32, *supra*.

⁵³ That is, it might be considered what we have become accustomed in this country to call a “gateway question of arbitrability.” See Alan Scott Rau, “Consent” to Arbitral Jurisdiction: Disputes with Non-Signatories, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION: CONSENT, PROCEDURE AND ENFORCEMENT 69, 71 (Belinda Macmahon ed., 2009) [hereinafter Rau, “Consent”].

This “question of arbitrability” -- whether there is a “duty for the parties to arbitrate” the dispute -- whether the parties have consented to a final arbitral judgment on the issues -- whether, in short, the arbitrators have “jurisdiction” to decide -- is undeniably an issue for judicial determination.

See, e.g., [PacifiCare Health Systems, Inc.](#), 538 U.S. at 407 n.2 (“If the contractual ambiguity could itself be characterized as raising a ‘gateway’ question of arbitrability, then it would be appropriate for a court to answer it in the first instance”); [Bazzle](#), 539 U.S. at 452 (“gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy,” are presumed to be for the courts); [Howsam](#), 537 U.S. at 84 (“a gateway dispute about whether the parties are bound by a given arbitration clause raises a ‘question of arbitrability’ for a court to decide”). The problem of terminology is of course extremely fraught, and I hardly intend to revisit it here. Cf. Rau, “Separability,” *supra* note 1, at 120 (“the term ‘arbitrability’ can easily be dispensed with”).

⁵⁴ Cf. Paulsson, *supra* note 33, at Ch. 3 (“if the parties have agreed that arbitrators are to decide a particular issue, the debate about

that issue is simply not jurisdictional”).

⁵⁵ This was made clear enough by Justice Breyer in *First Options*, *supra* note 11; see the discussion at note 36 *supra*; see also Rau, “Separability,” *supra* note 1, at 97 (“where the *First Options* presumption is overcome it must be because there is a court that is ‘satisfied’ that the parties had agreed to entrust this question of consent to the arbitrator, and that they were willing to be bound by this arbitrator’s award”).

⁵⁶ As it “concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties.” [Bazze, 539 U.S. at 452](#); see also text accompanying notes 10-12 *supra*.

⁵⁷ A very close parallel to *Bazze* is the curiously neglected third piece in the Court’s earlier “trilogy,” *Pacificare Health Systems, Inc. v. Book*, *supra* note 8 (The *Pacificare* opinion was written by Justice Scalia, who also concurred in the *Bazze* plurality). Here too the contract was deemed to be uncertain in meaning -- here, with respect to the question whether an exclusion of “punitive damages” should be read to bar the recovery of treble damages under RICO. Here too the Court declined to take upon itself “the authority to decide the antecedent question of how the ambiguity is to be resolved”; the case was remanded so that the arbitrators can “construe the remedial limitations.” The little-appreciated implication is that the *coverage of the arbitration clause* (“Did the parties intend to bar, or rather to retain, a claimant’s right to treble damages under RICO?”) *was made a matter for final determination by the arbitrators*.

As in *Bazze*, the Court in *Pacificare* did not directly address *the scope of judicial review* in the event the arbitrators should go on to find -- not only that the claimants had intended to waive their right to treble damages -- but also that such a waiver was permissible under federal policy (that it did not, for example, prevent the plaintiffs “from obtaining any meaningful relief for their statutory claim). Justice Scalia’s remark that questions like that, in the posture of the case, were “unusually abstract,” could perhaps mean nothing more than that these further questions would become moot in the event the arbitrators found the contractual limitations of remedy *not* to bar treble damages. But his reliance on *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) suggests to me that the more likely explanation is elsewhere -- that in his view, an arbitration panel would be particularly well-placed to answer these questions -- questions that depend in some measure on that appreciation of context and commercial reality which is the particular realm of arbitration -- and that in consequence arbitral findings would be subject to a judicial control substantially less intrusive than *de novo* review. (After all the Court had no occasion to address the question of future judicial review in *Howsam* either, but we can be pretty sure that an arbitral finding there with respect to whether a claim remained “eligible for arbitration” would be conclusive.) I have argued at some length elsewhere that the validity of punitive damages exclusion is *not at all* a question of “the validity of the arbitration agreement” itself; see note 237 *infra*.

Identical to *Pacificare* is *Alliance Bernstein Inv. Research & Management, Inc. v. Schaffran*, 445 F.3d 121 (2d Cir. 2006). Assume the parties have excluded from arbitration claims alleging “employment discrimination.” Do the arbitrators have jurisdiction over a “whistleblower” claim under the Sarbanes-Oxley Act? Even if this question of “arbitrability” would normally be reserved for a court, does the canonical “broad clause” alone serve to reallocate to the arbitrators themselves the power to interpret the contract to define the scope of their own power? (yes and yes; the “the parties agreed that the arbitrators would be ‘empowered’ to interpret” NASD rules “and they agreed further that any determination would be ‘final and binding,’” 445 F.3d at 127; “the Code unequivocally provides for the arbitrability dispute at issue in this case to be decided in arbitration,” 445 F.3d at 126).

⁵⁸ [Stolt-Nielsen, 130 S. Ct. at 1768 n.4](#).

⁵⁹ [Id. at 1770](#).

⁶⁰ [Id. at 1767-68](#); cf. note 23 *supra*.

⁶¹ [Id. at 1770](#); see also [id. at 1767-68](#).

This was the only invocation of any statutory ground for vacatur. You will recall, however, that “manifest disregard of the law” played a major part in the lower court proceedings here, see note 50 *supra*, and the Court did touch on that matter in a rather curious footnote, [id. at 1768 n.4](#). Justice Alito remarked that “we do not decide” whether the “manifest disregard” ground “survives” *Hall Street* as an “independent ground for review” -- but added that “assuming, *arguendo*, that such a standard applies, we find it satisfied for the reasons that follow.” All this is lazy and readily lends itself to ridicule; see Adam Samuel, *The U.S. Supreme Court’s Undistinguished 2010 Trilogy: An English View*, DISP. RES. J., Feb.-April 2011, at 33, 35 (“dodging issues”), 36 (“painful fence-sitting”). But I don’t find the Court’s footnote overly bizarre: For all the Court is really saying, at bottom, is that

any notion of “manifest disregard” doesn’t, and can’t, matter much to any sensible result of any case -- which must be reached on other grounds and for other reasons. And this is something we knew all along.

⁶² [Stolt-Nielsen, 130 S. Ct. at 1770, 1776.](#)

⁶³ The Court in *Stolt-Nielsen* acknowledged that in light of the express agreement of the parties subjecting themselves to the AAA rules, “we need not revisit” the question whether the permissibility of class-wide proceedings was otherwise reserved for the arbitral tribunal, [Stolt-Nielsen, 130 S. Ct. at 1772](#). But it nonetheless went out of its way to deprecate whatever significance *Bazzele* could possibly have with respect to that question -- noting that after all, “only the plurality” of the Court there had decided that in fact it was. *Id.* Strictly speaking that is of course true -- although it elides the inconvenient point that in Justice Stevens’ view, an order compelling class-wide arbitration -- a result that the arbitrators themselves could also be expected to reach independently -- was in any event “correct as a matter of law,” [Bazzele, 539 U.S. at 455](#). See also Whitehall, *supra* note 26, at 16 (since it “was not necessary for the Court to spend any significant time and space addressing this aspect of *Bazzele*,” the Court’s opinion “may well signal the Court’s dissatisfaction” with the premise that the clause construction issue is presumptively one for the arbitrators). The Court’s decision in *Stolt-Nielsen* also undercut *Bazzele* in a more fundamental fashion: When Justice Ginsburg in dissent noted in passing that the issue of class-wide proceedings merely concerned “the procedural mode available for presentation of [the claimant’s] antitrust claims,” [Stolt-Nielsen, 130 S. Ct. at 1781-82](#), she seemed to be channeling the *Howsam/Bazzele* jurisprudence under which such “procedural” questions were presumptively confided to arbitrators “well situated” to answer them. (See [Howsam, 537 U.S. at 85](#) (“the NASD’s time limit rule falls within the class of gateway procedural disputes that do not present what our cases have called ‘questions of arbitrability’”); [Bazzele, 539 U.S. at 452-53](#) (“the relevant question here is what *kind of arbitration proceeding* the parties agreed to,” a matter that “concerns contract interpretation and arbitration procedures”)). But the majority brushed this aside: “If the question were that simple, there would be no need to consider the parties’ intent with respect to class arbitration.” [Stolt-Nielsen, 130 S. Ct. at 1776](#) (citing *Howsam*). I find that a most puzzling comment, one that may reflect some willful misunderstanding: In the first instance the relevant “intention” at stake in *Howsam* -- or *Bazzele* -- or *Stolt-Nielsen* -- would appear to concern *the parties’ willingness to submit to an arbitral determination*: *Howsam*, as well as *Bazzele*, are explicitly keyed to a presumption that it is precisely such “procedural” matters that the parties are likely to *have wished to entrust to the arbitrators* for a final decision. And if indeed it is only the proper “procedural mode” of adjudication that is implicated, then party intention remains critical in still another sense -- in the sense that it then becomes a matter for the arbitrators themselves to go on to tell us *what the parties’ manifestation of intention in their contract “means.”*

⁶⁴ The Court was divided 5-3 (Justice Sotomayor did not participate). Justice Kennedy, who had dissented in *Bazzele* on the ground that ordering class-wide arbitration was impermissible as a matter of federal law, naturally found himself in the majority here, as did Justice Alito and Chief Justice Roberts. Justice Thomas had also dissented in *Bazzele* -- but on the ground that the state court rulings ordering class-wide arbitration should not be *interfered with* by federal law; here, though, the absence of any overt Supremacy Clause concerns left him free to join the majority as well. The fifth vote of Justice Scalia -- who had concurred in Justice Breyer’s opinion in *Bazzele* -- is considerably more difficult to rationalize. Justice Stevens, who had been willing to join the plurality in *Bazzele* -- at least to the extent of remanding the case and preserving the issue of contract construction for the arbitrators -- appropriately dissented in *Stolt-Nielsen* (as did of course Justice Breyer himself and Justice Ginsburg, both of whom were in the same position).

⁶⁵ [Stolt-Nielsen, Oral Argument, supra note 45, 2009 WL 4662509 at *39 \(Justice Scalia\).](#)

⁶⁶ Section 4 of the FAA, as we know, mandates a court “order directing the parties to proceed to arbitration in accordance with the terms of the agreement.” (For the use of § 4 to rein in unauthorized arbitrations, in the interest of preserving “freedom from arbitration,” see the discussion at note 32 *supra* and at text accompanying note 172 *infra*.) And after an award has been rendered, § 10(a)(4) provides for vacatur where the arbitrators were “guilty” of “misbehavior by which the rights of any party have been prejudiced”: It should hardly be surprising that this antique formulation does not expressly track Art. V(1)(d) of the New York Convention -- which permits a refusal of recognition and enforcement where “the arbitral procedure was not in accordance with the agreement of the parties” -- but it would be surprising indeed if the scope of § 10 were held to be much narrower and not to encompass these Convention grounds as well; cf. 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2595 (2009) (“in jurisdictions where no statutory provision directly addresses the subject, courts have nonetheless held that arbitral awards are subject to annulment if the arbitrators fail to observe the procedures agreed by the parties”); cf. Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT’L ARB. 213, 236 (1996) (“as a practical matter [it is] highly unlikely -- to put it mildly -- that actual results in concrete cases will tend to diverge significantly depending on whether an award is scrutinized under Article V of the Convention or under § 10 of the FAA”).

⁶⁷ R.3.

⁶⁸ See [Stolt-Nielsen, Oral Argument, supra note 45, 2009 WL 4662509 at *52](#).

⁶⁹ See Rau, “Separability,” *supra* note 2, at 92-94, 110-111 (elaborating a “conceptual framework” involving “three separate questions [that] will recur in connection with any arbitration”).

⁷⁰ Brief for [Petitioners, supra note 46, 2009 WL 2809359 at *8](#).

⁷¹ See text accompanying notes 16-21 *supra*.

⁷² [Stolt-Nielsen, 548 F.3d at 89](#) (emphasis added).

⁷³ See text accompanying notes 16, 23 *supra*.

⁷⁴ [Stolt-Nielsen, 548 F.3d at 89](#) (emphasis added).

⁷⁵ See note 22 *supra*. See generally Alan Scott Rau & Edward F. Sherman, [Tradition and Innovation in International Arbitration Procedure](#), 30 TEX. INT’L L.J. 89, 113 (1995) (“the dominant emerging tendency” has been a “presumption against consolidation in the absence of some affirmative evidence that the parties have consented to it, either in their original agreement or later at the time of submission”).

⁷⁶ See Clause Construction Hearing, Joint Appendix, *supra* note 24, [2009 WL 2777896 at *104a-*105a](#) (counsel for respondents: “you have to know what the law said at the time you enter this agreement because you’re not going [to] write down everything the law gives you anyway [T]hroughout this time period, they knew you couldn’t consolidate.”).

⁷⁷ This insistence by the parties on mutually exclusive default rules triggered by “silence” presumably explains their convergence on the proposition that the contract was “unambiguous” -- with the apparent consequence that any need to consider “parol evidence” was obviated. See *id.* at *77a (counsel for claimant: “all the parties also agree that the arbitration clause is unambiguous”); [Stolt-Nielsen, 130 S. Ct. at 1770](#).

The continuing reliance by lawyers on the trope of lack of “ambiguity” -- even in circumstances where it serves no particular function -- even in circumstances where there is no danger whatever of wayward fact finding on the part of a jury -- continues to mystify me. Cf. RESTATEMENT (SECOND) CONTRACTS, § 212 cmt. d. (“historically,” “partly perhaps because of the fact that jurors were often illiterate, questions of interpretation of written documents have been treated as questions of law in the sense that they are decided by the trial judge rather than by the jury”). For the same reasons -- while the concept of “an agreement that is silent” is challenging enough -- the category of “an agreement that is *unambiguously* silent” is merely calculated to cause migraine. But cf. Whitehill, *supra* note 26, at 2.

It is not our lot to escape doubt. I still remember an episode from my first-year Contracts class, when during a discussion of the Restatement First § 31 (“In case of doubt it is presumed that an offer invites the formation of a bilateral contract”), our professor asked, “but what of the case where there is doubt as to whether there is doubt?” Even at the time, I think, I sensed that this could not have been intended to be taken seriously as a useful aid to taxonomy -- although in the hands of the much- and appropriately-revered Jack Dawson it was certainly clever enough Socratically.

⁷⁸ See Brief for [Respondent, 2009 WL 3404244 at *33-*34](#) (counsel for claimant: “the contract’s conferral on the arbitrators of power to decide ‘any’ dispute is most reasonably read as not limited to the subset of disputes between a single parcel tanker owner and a single customer”; “so, too, the clause’s use of the term ‘dispute’ is permissibly read to include disputes involving multiple parties, as here”); Oral Argument, [supra note 45, 2009 WL 4662509 at *43-*44](#) (counsel for claimants: “that goes back to whether ‘any

disputes' can plausibly be read to encompass the class mechanism, because if it can, well then, by agreeing to that contract, you have, in effect, agreed to something that delegates to the arbitrator the ability to use that"); *see also* Clause Construction Hearing, Joint Appendix, *supra* note 24, 2009 WL 2777896 at *79a ("the arbitration clause here contains broad language and this language should be interpreted to permit class arbitrations"; "the term 'any' and 'all differences and disputes of whatever nature' ... would include class arbitrations").

For the respondents, *see* Clause Construction Hearing, Joint Appendix, *supra* note 24, 2009 WL 2777896 at *92a-*93a (counsel for respondents: "you guys read the contract and you figure out the procedures that apply, whether we contemplated having a class action or not"); *id.* at *95a (Arbitrator Jentes: "What's the issue?"; counsel for respondents: "What do the parties intend in this contract. Basic contract interpretation. And it's for you to decide"); Brief for Petitioners, *supra* note 46, 2009 WL 2809359 at *21 (before the arbitrators, respondents argued "that in context, the [arbitration] clause should be construed to prohibit class arbitration as a matter of properly inferred intent").

⁷⁹ [Stolt-Nielsen](#), 548 F.3d at 99.

⁸⁰ Clause Construction Hearing, Joint Appendix, *supra* note 24, 2009 WL 2777896 at *77a. But -- once again -- this can only be understood in the context and flow of the argument -- as an attempt to underline that a favorable default rule remained available: "Therefore," the claimant went on, "there has been *no agreement to bar* class arbitrations." *Id.*

⁸¹ *Cf.* Oral Argument, *supra* note 45, 2009 WL 4662509 at *12.

⁸² The arbitral award acknowledged that the arbitrators "must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action," *see* 548 F.3d at 97. And so on review, the claimants not only argued the point of interpretation, *see* note 82 *supra*, but in fact went further -- suggesting that *they had actually submitted* this question of contract interpretation to the arbitrators, and that the arbitral award, ordering class-wide proceedings, had been rendered *precisely on that basis and in response to its arguments*; *see* Oral Argument, *supra* note 45, 2009 WL 4662509 at *30-*32 ("what they relied on was the broad language of the agreement, the language 'any disputes'; 'they are saying: We are not going to do this based on a default rule; we are going to do this based on the language and intent. Right?'; *id.* at *55 (counsel for claimants had previously made "the argument that we believe the arbitrators adopted, which is that the arbitration clause here contains broad language, and this language should be interpreted to permit class arbitrations").

⁸³ [Stolt-Nielsen](#), 130 S. Ct. at 1770.

⁸⁴ *See id.* at 1776 & n. 10; *see also* text accompanying note 62 *supra* ("#2").

⁸⁵ I am extremely skeptical that parsing the conventional boilerplate arbitration clause, in an attempt to discover indicia of "intention" with respect to class-wide proceedings, can ever amount to a serious exercise in interpretation. Still, there are always potential semantic hooks if one diligently looks for them. Perhaps someone may occasionally be found who is willing to attribute significance to whether the object of a preposition is singular or plural; *see* note 78 *supra*; *see also* Sidhu v. GMRI, Inc., Partial Final Clause Construction Award of Arbitrator, AAA 11 160 02273 04 (June 10, 2005) (provisions of the employer's Dispute Resolution Procedure "which suggest that a class arbitration is permissible" includes the provision that the DRP "applies to *the claims of Employees*" (emphasis added by arbitrator)). Or consider the wonderfully brazen sleight-of-hand in this arbitral syllogism: An arbitration clause says that "no civil action concerning any dispute ... shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration." Now:

- "Since there can be no dispute in any court without a civil action of some sort," "it follows that the intent of the clause ... is to vest in the arbitration process everything that is prohibited from the court process."

- "A class action is plainly one of the possible forms of civil action that could be brought in a court."

- "Therefore [sic], because all that is prohibited by the first part of the clause is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration." Q.E.D.

Sutter v. Oxford Health Plans, Inc., Memorandum and Order, AAA 18 193 20593 02 (Sept. 23, 2003).

In an alternative attempt to find an "interpretive path," one might possibly find significant the surrounding framework in which disputes are normally processed: For example, are class actions commonplace in cognate litigation, say in employment discrimination claims? *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 n.13 (1977) ("Title VII actions are by their very nature class complaints"); Whitehill, *supra* note 26, at 14-15 (imagine a price-fixing claim arising from a commercial supply

contract “with the same broad arbitration agreement”; since “class action antitrust suits invariably follow the related criminal proceedings,” “it could fairly be argued that the parties understood that an antitrust class arbitration of that type could arise and be covered by” the agreement); [Smith & Wollensky Restaurant Group, Inc. v. Passow](#), 2011 WL 148302 at *1 (D. Mass. Jan. 18, 2011) (arbitrator noted that “wage and hour claims like those in play here are frequently pursued as class or collective actions, and both [parties] must be deemed to understand that”; held, clause construction award was “the result of a reasonable interpretation” of the agreement).

Might the prevalence of class litigation, then -- given its comforting familiarity -- bespeak the acceptability of the mechanism of aggregation -- and thus give us some assurance that it was within the expectation of the contracting parties? (Or might it rather represent the precise motivation for the parties’ desire to *avoid* it, through an escape into arbitration?)

⁸⁶ See 5(5) GLOBAL ARBITRATION REV. 33, 34 (2010) (remarks of Rusty Park). Equally sanguine is S.I. Strong, *Opening More Doors than It Closes*, 2010 LLOYD’S MARITIME & COMM. L.Q. 565, 568 (“the decision will not dissuade claimants from bringing class claims in arbitration,” and “[r]ather than closing the door to class arbitration, *Stolt-Nielsen* has virtually ensured the device’s continued existence”).

⁸⁷ See [Stolt-Nielsen, Oral Argument, supra note 45](#), 2009 WL 4662509 at *36 (Justice Scalia: “so the only language you can point to is ... that ‘any dispute’ language?”; “you are hanging ... your whole assertion that these arbitrators ... found that the contract positively authorized class action, upon that language?”).

⁸⁸ See, e.g., *Jock v. Sterling Jewelers*, *supra* note 26. (Rakoff, D.J.). To demonstrate the parties’ “shared intent to permit class arbitration,” the claimant in *Jock* had duly pointed to the “broad language” of the agreement, encompassing “any dispute, claim or controversy,” and empowering the arbitrator to award “any types of legal or equitable relief that would be available in court. But the district court found this clearly inadequate: After all, “the clauses at issue in *Stolt-Nielsen* contained similarly broad wording.” [725 F. Supp. 2d at 449](#). Nor did the record provide any support for an “implicit” agreement to authorize class-action arbitration. And the fact that here (unlike *Stolt-Nielsen*) there was no “stipulation” as to “silence” was far too narrow a distinction, one that “cannot cure” the deficiencies in the award “in light of *Stolt-Nielsen*’s essential holding.” [Id. at 450](#). To the same effect is Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQUETTE L. REV. 1103, 1155 (2011). The authors sensibly conclude that awards purporting to “construe the arbitration agreement” -- and which in doing so rely on “the broad language” of the agreement in order to find class-wide proceedings permissible -- will “not satisfy” *Stolt-Nielsen* -- because according to that opinion “a general arbitration clause ... does not authorize class arbitration.” (They do not, however, address the possible relevance to this question of any party “stipulation” regarding a “lack of agreement.”)

⁸⁹ The district court’s decision in *Jock* was reversed by the court of appeals, [2011 WL 2609853 \(2d Cir. July 1, 2011\)](#). There was no “stipulation” here, and so once this was put aside, the arbitrator was free to find an agreement for class-wide proceedings “by implication.” Not indeed from “the mere fact of an agreement to arbitrate,” for that would be expressly proscribed by *Stolt-Nielsen* -- but apparently from the next best thing (and functionally identical to it) -- the terms of a boilerplate “broad” clause. We are not told just how the arbitrator managed to do this -- nor what, if anything, in the agreement was thought to be particularly probative of consent to class-wide proceedings. For since she was writing before *Stolt-Nielsen*, and so could look only at *Bazzle*, she had (understandably enough) inquired only into whether the agreement “precluded” class-wide proceedings, not whether it “manifested any affirmative intention” to permit them. One would have thought that this way of putting things could no longer be tolerated, *see* text accompanying notes 24-26 *supra*.

Still, for the Second Circuit the arbitrator could not have been said to have “exceeded her powers,” for -- in a telling formulation -- to vacate on that ground would necessitate a finding that she had “consider[ed] issues” that the parties had not “submitted for her consideration,” or had “reach[ed] issues” that “the agreement or the law categorically prohibited [her] from reaching,” and neither was the case. Putting the question this way speaks volumes -- and cannot possibly be thought faithful to the substantive federal default rule mandated by *Stolt-Nielsen*: For when all is said and done, could anything in any way different be said of the arbitrators in *Stolt-Nielsen* itself? Judge Winter, in dissent, was suitably appalled, suggesting that *Stolt-Nielsen* “has been rendered an insignificant precedent in this circuit”). *Id.* at *14 n.2.

⁹⁰ Omri Ben-Shahar, “*Agreeing to Disagree*”: *Filling Gaps in Deliberately Incomplete Contracts*, 2004 WISC. L. REV. 389, 399 n.25 (UCC § 1-201(12) defines “contract” as “the total legal obligation that results from the parties’ agreement as determined by [the Code],” “including all the gap fillers”).

- ⁹¹ [Stolt-Nielsen, Oral Argument, *supra* note 45, 2009 WL 4662509 at *5](#). See also *id.* at *40 (Justice Breyer: “now of course, it isn’t really a meeting of the minds. But that’s just the summary of the conclusion as to what, objectively read, those words in the contract mean”); *cf. id.* at *17 (Justice Scalia: “I really don’t understand what it means to say that the contract does not cover it ... [I]f the contract is silent, either the court or the arbitrator has to decide, what is the consequence of that silence, in light of the background, in light of implied understandings.”).
- ⁹² *Cf.* ROBERT HAMILTON, ALAN SCOTT RAU, & RUSSELL WEINTRAUB, *CASES AND MATERIALS ON CONTRACTS* 364-67 (2d ed. 1992) (“Note: Ambiguity and Vagueness in Drafting Contracts”).
- ⁹³ *Cf.* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 *TEX. L. REV.* 1581, 1583 (2005) (“parties may rationally decide not to provide for a contingency, preferring to economize on negotiation costs by delegating completion of the contract to the courts should the contingency materialize”).
- ⁹⁴ *Cf. WPC Enterprises, Inc. v. U.S.*, 323 F.2d 874, 879 (Ct. Claims 1964) (was the contractor entitled to furnish identical components made by firms other than those expressly named in the contract specifications?; “there was no subjective coming-together, it is true, but an enforceable agreement came into being nevertheless”; “it is a normal characteristic” of this class of cases that the “gap has not been permitted to swallow the whole contract except perhaps where the gulf is far closer to the bounds of the entire consensual perimeter than here”). See also *LCC v. Henry Boot & Sons Ltd.*, [1959] 1 W.L.R. 1069 (H.L.) (in a contract for the construction of apartment buildings, did an escalator clause calling for an increase in payments in the event of increases in the “rates of wages” include increases in the costs of “holiday stamps”?; the parties may have entered into the contract both perfectly aware of their opposing views on the subject, but the court summarily rejected the assertion that on account of this difference of views “there was no consensus ad idem”).
Note that while courts remain reluctant at least in theory to “make a contract for the parties” -- while they continue to insist on a certain level of clarity and completeness in the terms of a contract -- their concerns do not apply with anything like their original force when the parties have chosen to entrust the power to fix terms to private decision-makers, chosen as their surrogates, in a procedure for which they have agreed to bear the costs. See Rau, *Culture*, *supra* note 50, at 473-77. The authority of arbitrators in the United States to construe contracts so as to fill gaps in insufficiently specified agreements is treated as noteworthy and unusual in CHARLES JARROSSON, *LA NOTION DE L'ARBITRAGE* 303 (1987).
- ⁹⁵ *Cf.* Rau & Sherman, *supra* note 75, at 112: When faced with “contractual silence,” “the first reaction of any court is naturally to worry the text of the agreement in order to discover some sort of underlying narrative.” For example, a court might be able “to find some sort of ‘implied’ consent to consolidation” where it is presented with a vertical chain of related contracts and subcontracts.
- ⁹⁶ See text accompanying notes 19, 33-34, *supra*.
- ⁹⁷ Ben-Shahar, *supra* note 90, at 393.
- ⁹⁸ Rau & Sherman, *supra* note 75, at 114.
- ⁹⁹ The classic demonstration, if one is to take it at face value, is that of Justice Cardozo in [Wood v. Lucy, Lady Duff-Gordon](#), 118 N.E. 214 (N.Y. 1917) (“A promise maybe lacking, and yet the whole writing may be ‘instinct with an obligation,’ imperfectly expressed”). *Cf.* Posner, *supra* note 93, at 1603-04 (if “one of the rival interpretations proposed does not make commercial sense, the interpretation will be rejected because it probably does not jibe with what the parties understood when they signed the contract”); Ian R. Macneil, [Efficient Breach of Contract: Circles in the Sky](#), 68 VA. L. REV. 947, 953 n.25 (1982) (“‘Casual empiricism’ is not a pejorative in my vocabulary; indeed, when used by wise people its other name is wisdom”).
To privilege a meaning towards which “most sensible people” would gravitate, may not lead us directly to what the parties actually “had in mind when contracting” -- but it is intended to coincide with “what a reasonable person would have understood under the circumstances,” *cf.* STEVEN J. BURTON, *ELEMENTS OF CONTRACT INTERPRETATION* 44 (2009). More precisely, perhaps, it is intended to coincide with what a reasonable plaintiff had the right to believe -- plus what a reasonable defendant should have realized that the plaintiff believed. But of course, the orthodox “objective theory of Contracts” treats *this* precisely as the primarily relevant intention -- or more properly, treats this as the appropriate *definition* of intention.

¹⁰⁰ See Rau, "Separability," *supra* note 1, at 29 n.71 ("sales law consists of little else but an abundant off-the-rack stock of background presumptions").

¹⁰¹ Ben-Shahar, *supra* note 90, at 397 ("the mimicking theory is based on a premise that there exists an underlying 'will' or hypothetical consent," or more precisely, that there are "specific definitive terms that the parties would have rationally agreed upon had they paid sufficient attention to the matter"); see also Clayton P. Gillette, *Cooperation and Convention in Contractual Defaults*, 3 S. CAL. INTERDISC. L.J. 167, 170-71 (1993) ("a default rule concerning risk of loss may reflect the objective that the parties would have achieved had they bargained fully about the matter, while allowing [them] to save the costs of achieving that bargain").

¹⁰² Rau & Sherman, *supra* note 75, at 115.

¹⁰³ E.g., Note, *Compulsory Consolidation of International Arbitral Proceedings: Effects on Pacta Sunt Servanda and the General Arbitration Process*, 2 TULANE J. INT'L & COMP. L. 223, 251 (1994) ("If the parties to a multi-party dispute have not explicitly agreed to submit their disputes to a consolidated tribunal, then they have chosen to submit their disputes to separate arbitral tribunals Under the doctrine of *pacta sunt servanda*, the parties are only bound by what is in the contract"); cf. Rau & Sherman, *supra* note 75, at 113 (such "blithe assertions" are "nothing more than an extravagant form of question-begging").

¹⁰⁴ See Juliet P. Kostritsky, *Interpretive Risk and Contract Interpretation: A Suggested Approach for Maximizing Value*, available at <http://ssrn.com/abstract=1725467> (Case Research Paper Series in Legal Studies, Working Paper 2010-39) (Dec. 2010), at p. 5; see also MARGARET N. KNIFFIN, 5 CORBIN ON CONTRACTS § 24.3 (rev. ed. 1998) (a court's action in filling a gap "with respect to a matter which the parties did not have in contemplation and concerning which they therefore had no intention" "may be called construction" but "should not be called interpretation").

¹⁰⁵ Cf. RESTATEMENT, SECOND, CONTRACTS § 204 cmt. a. ("the supplying of an omitted term is not technically interpretation, but the two are closely related"); *id.* cmt. c. (where there is "a common tacit assumption" or where "a term can be supplied by logical deduction from agreed terms and the circumstances," then "interpretation may be enough" -- nonetheless "the supplying of an omitted term is not within the definition of interpretation").

¹⁰⁶ See Posner, *supra* note 93, at 1586; see also Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1719 (1997) ("when courts determine the meaning of a contract, they frequently resort to several sources at the same time," making the supposed distinction between interpretation of the contract and supplementation (or "gap filling"), "problematic"); cf. Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 579 (2006) ("one might plausibly argue that interpretive presumptions are analytically the same as default rules even if they are placed in a separate doctrinal category").

¹⁰⁷ HAMILTON, RAU & WEINTRAUB, *supra* note 92, at 366-67.

At oral argument in *Stolt-Nielsen*, Justice Breyer posed this hypothetical: Imagine a worker who says: I have a right, permission, it's permissible for me to eat lunch next to the machine. The employer says no So the arbitrator or the judge reads the words [of the contract]. Nothing ... Then the judge or the arbitrator reads the rest of the contract. Hasn't a clue. Then the arbitrator or the judge goes and looks and sees: "What's practice around here? ... Then they might look to what happens in the rest of the industry.

Stolt-Nielsen, Oral Argument, *supra* note 45, 2009 WL 4662509 at *40.

It is obvious that in adjudicating such a case, whether one:

- looks at course of performance and custom and usage, or
- asks what seems most consistent otherwise with the overall structure of the agreement, or
- seeks to determine what is most likely to be consistent with the usual background presumption of employer control of physical arrangements in the workplace --

all will call for conducting a similar analysis and will tend to lead to a similar result.

It is striking that Justice Breyer doesn't stop there but continues: "Then they might look to what happens in foreign countries with comparable industries. Then they might look to public policy. They might look almost to anything under the sun they think is relevant." All of this goes to "what, objectively read, those words in the contract mean."

¹⁰⁸ Posner, *supra* note 106, at 579.

¹⁰⁹ Cf. Ben-Shahar, *supra* note 90, at 391-92, 414 (the premise that “a mutual will of the parties exists” is “problematic in incomplete contracts,” and amounts to a “pure fiction”).

¹¹⁰ [RESTATEMENT, SECOND, CONTRACTS § 204](#) cmt. d; cf. Zamir, *supra* note 106, at 1754 (“the judicial process of recognizing and developing ‘implied terms’ ordinarily produces rules that conform to prevailing conceptions of what is just, reasonable, and efficient in contractual relations”); Nicholas R. Weiskopf, [Wood v. Lucy: The Overlap between Interpretation and Gap-Filling to Achieve Minimum Decencies](#), 28 PACE L. REV. 219, 226-27 (2008) (“the exhaustion of all interpretive steps is not needed to create a ‘gap’ designed to leave room for mandated observance of perceived minimum decencies in the course of performance”). When courts do this they are still remaining faithful to their usual role in formulating rules of general application -- they are hardly at large, purporting to act as *amiables compositeurs* -- nor could that be said of arbitrators who might follow their example.

¹¹¹ [RESTATEMENT, SECOND, CONTRACTS § 204](#).

¹¹² See, e.g., Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 106 (1989) (“what rational parties would have agreed to is ... strong evidence of what these parties did, in fact, agree to where there is silence or ambiguity”; there is accordingly “a complete congruence between the ‘efficient’ identification of the proper contract terms and honoring what the parties did, or would have agreed to do, under contract”); Randy E. Barnett, [The Sound of Silence: Default Rules and Contractual Consent](#), 78 VA. L. REV. 821, 827, 909 (1992) (when “default rules are chosen to reflect the commonsense or conventional understanding of most parties,” “enforcement may still be justified on the grounds of consent”; “abstract methods of analysis are simply presumptive surrogates for evidence of actual meaning”).

¹¹³ Cf. David Charny, [Hypothetical Bargains: The Normative Structure of Contract Interpretation](#), 89 MICH. L. REV. 1815, 1875-77 (1991) (in the case of two unmarried persons living together, a court found “the existence of an agreement for property to be owned jointly”; this “strategy of imaginative reconstruction” -- or in an alternative formulation, this “implicit paternalism” -- might be justified on the ground that it “may help to change social attitudes about duties of men and women living in intimate relationships”; “the judicial standard of fair conduct may be one that persons will defer to”).

¹¹⁴ For example, the time-honored “presumption of arbitrability” is probably best viewed as a majoritarian default that imputes to contracting parties a preference for “one-stop adjudication”; see Rau, “Separability,” *supra* note 1, at 115-16 (“inevitably more economical, and thus likely to have been desired by both parties *ex ante*”; in addition, “questions of scope and questions going ‘to the merits’ are often so intertwined that we can expect similar arbitral competence to be relevant, and similar factual considerations to come into play”). At the same time, though, it might be thought to reflect a federal policy preference in favor of directing disputed issues to alternative fora. See, e.g., [Roadway Package System, Inc. v. Kayser](#), 257 F.3d 287, 296-97 (3d Cir. 2001) (“any default rule is doomed to be inaccurate in some cases,” but in light of the FAA’s “*raison d’être*,” it is worse to “wrongly conclud[e] that parties intended to opt out” of the FAA’s standards of review, than to “wrongly conclud[e] that they did not”).

Either way, the methodology -- which is impeccable -- has particular resonance for the cases we are discussing here. I say the methodology is “impeccable” because in any concrete case, as a response to a particular question, it supplies a presumptively applicable term on the basis either of

- an assessment of presumed intent or
- an instrumental exercise of state policy.

By contrast -- since “Contract Law” does not float untethered in the sky -- I am not sure what it can mean to say that “contract law” does not “take a stance on whether to treat ambiguous language to channel performance in any particular direction” or that “there is no general principle of contract law” that tells us to construe ambiguous clauses “in favor of arbitration”; cf. Lawrence A. Cunningham, *Rhetoric versus Reality in Arbitration Jurisprudence* (forthcoming, Duke L.J., available at <http://ssrn.com/abstract=1809005>), at p. 11. “Contract law” did not “take a stance” on whether a “silent” contract contained any duty of “best efforts” either, until Cardozo’s now-canonical opinion in *Wood*, see note 99 *supra*. Further on the notion of “contract law,” see the discussion at note 227 *infra*.

As a device allowing a court to “fill gaps” in the absence of an “agreement,” a default rule is necessarily -- at the same time -- a presumption that allocates between the parties the burden of persuasion as to whether a particular term was included in the deal. And in assigning burdens in litigation it is a familiar enough phenomenon to see the choice made largely in the interest of handicapping a contention that happens to be socially disfavored. See, e.g., Edward W. Geary, [Presuming and Pleading: An Essay on Juristic Immaturity](#), 12 STAN. L. REV. 5, 11 (1959) (while “policy more obviously predominates at the stage of determining

what elements are material, its influence may nevertheless extend into the stage of allocating those elements by way of favoring one or the other party to a particular kind of litigation"); Marshall S. Sprunge, Note, [Taking Sides: The Burden of Proof Switch in *Dolan v. City of Tigard*](#), 71 N.Y.U. L. REV. 1301, 1309-10 (1996)(this rationale "reveals the link between the procedural device of the burden of proof and substantive legal concerns"; for example, "since some judges disliked that a negligent defendant could escape liability merely on the fortuity that a plaintiff had also been negligent, they assigned to the defendant the burden of proving contributory negligence").

¹¹⁵ See Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction between Will Interpretation and Construction*, 56 CASE WESTERN RES. L. REV. 65, 82-83 (2005)(the ALI "has decided that will interpretation and will construction are not discrete parts of a sequential process but are, in fact, simply components of a single process known as construction").

¹¹⁶ See, e.g., Laura A. Cisneros, *The Constitutional Interpretation/Construction Distinction: A Useful Fiction*, 27 CONSTITUTIONAL COMMENTARY 71, 75, 80 (2010)(any line between the two is "artificial, as it defies all practical attempts to draw it consistently from case to case," and, "as an aid to the practice of judging," "unhelpful").

¹¹⁷ See CORBIN ON CONTRACTS, [supra](#) note 104, § 24.3 at 11 (the "overwhelmingly common practice" of courts is to use these terms "interchangeabl[y]").

¹¹⁸ E.g., [Medtronic AVE, Inc. v. Advanced Cardiovascular Systems, Inc.](#), 247 F.3d 44, 53 n.2 (3d Cir. 2001) ("When a district court interprets language contained in contracts we review its determination under the clearly erroneous standard. But if the district court engages in contract construction, we exercise plenary review"); [Horan v. Danton](#), 2005 WL 189733 (D. Del. Jan. 27, 2005), *aff'd in part and vacated in part*, 2006 WL 859042 (3d Cir. April 3, 2006)(however, here it "does not matter" whether the Bankruptcy Court "construed" or "interpreted" the agreement, as under Delaware law "construction and/or interpretation" of an unambiguous written contract "is a question of law").

¹¹⁹ Alan Scott Rau, [Contracting Out of the Arbitration Act](#), 8 AM. REV. INT'L ARB. 225, 248 (1997). See also LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 552 (abridged ed. 1965)(discussing the "law-making aspect of the fact-finding process"; "in all but very clear cases, the finding of fact is likely to be in some measure tendentious").

¹²⁰ See [S.A. Wenger & Co., Inc. v. Propper Silk Hosiery Mills](#), 146 N.E. 203 (N.Y. 1924)("Traders may prefer the decision of the arbitral tribunal to that of the courts" on "difficult questions of law as well as of fact").

¹²¹ [Patton v. Garrett](#), 21 S.E. 679, 682-83 (N.C. 1895); see also [Univ. of Alaska v. Modern Constr., Inc.](#), 522 P.2d 1132, 1140 (Alaska 1974) (since the arbitration clause did not command arbitrators to follow "otherwise applicable law," they were free to determine the merits of plaintiff's claims "under their own notions of fairness").

¹²² [Stolt-Nielsen](#), 130 S. Ct. at 1769.

¹²³ The arbitrators in *Stolt-Nielsen* had in fact proceeded in much the same way as had the South Carolina courts in *Bazzle* -- and the default rule chosen by the courts there, had been unsuccessfully challenged by respondents on precisely the same grounds ultimately used to overturn the default rule chosen by the arbitrators in *Stolt-Nielsen*. See Brief for Petitioner [\[Green Tree\]](#), [supra](#) note 23, 2003 WL 721716 at *31 (South Carolina default rule "supplement[ed] the arbitration agreement, based," not on any attempt to "divine the intent of the parties," but solely on "its own views of public policy"; see also *Green Tree Financial Corp. v. Bazzle*, Oral Argument, [supra](#) note 31, 2003 WL 1989562 at *4, *26-27 ("it wasn't anything with respect to the language or understanding of the parties"; the opinion of the South Carolina court "doesn't talk about anything that has to do with consent. It talks about equity and fairness and judicial economy, all factors that influence the rights of third parties who have nothing to do with the arbitration agreement that's before the arbitrator").

¹²⁴ In fact the Uniform Arbitration Act has long warned that "the fact that the relief [granted by arbitrators] was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." UNIF. ARB. ACT § 12(a) (1955); see also REVISED UNIFORM ARBITRATION ACT, § 21(c) (2000). There are a number of possible implications

of this language. Among other things, the text has been invoked to buttress our understanding that arbitral awards need not in substance track the course of official jurisprudence. At the same time it also serves to remind us that whatever policies underlie the traditional refusal of courts to take upon themselves the task of salvaging an excessively indefinite "agreement to agree," they have no particular relevance when the parties were content to have an arbitral tribunal do so. *See also* note 94 *supra*.

¹²⁵ [Stolt-Nielsen, 130 S. Ct. at 1769.](#)

¹²⁶ *But cf.* S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?*, Stolt-Nielsen, AT&T, and a Return to First Principles, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791928 (2011) at pp. 54-55.

¹²⁷ *See* notes 60-61 *supra*.

¹²⁸ *But cf.* Strong, *supra* note 126, at 40 (the Court's language seems "odd," given that in cases like *Mitsubishi* the Court "has indicated that the failure to consider relevant public policies can lead to the overturning of an award"); Margaret Moses, *Did the U.S. Supreme Court, in its Stolt-Nielsen [sic] Decision, Make it Easier for Courts to Vacate Arbitration Awards?*, available at <http://kluwerarbitrationblog.com/blog/2010/12/14/did-the-u-s-supreme-court-in-its-stolt-nielsen-decision-make-it-easier-for-courts-to-vacate-arbitration-awards> (the Court's decision is "unusual and without precedent," since FAA § 10(a)(4) "has never previously been interpreted as meaning that if arbitrators consider public policy, they have exceeded their powers"); Drahozal & Rutledge, *supra* note 88, at 1148 n.159 (if the "rationale" of *Stolt-Nielsen* is "that arbitrators lack the authority of common law courts to make decisions on the basis of public policy," does this suggest that parties by agreeing to arbitration might "be forgoing substantive rights" despite declarations to the contrary in cases like *Mitsubishi*?); Gerald Aksen, *The Short Life of International Class Arbitration in the USA*, in LIBER AMICORUM EN L'HONNEUR DE SERGE LAZAREFF 47, 52 (Laurent Lévy et al. eds., 2011) (*Stolt-Nielsen* "casts doubt regarding who decides 'public policy' issues," which is "particularly troubling -- arbitrators decide questions of sound policy all the time"; while the New York Convention "allows a public policy defense in award review, here the decision arguably holds that the question does not even fall under the scope of a broad arbitration clause"). But distinguish between two quite distinct questions: (a) Suppose that on normal principles of contract interpretation (and with the aid of the "presumption of arbitrability"), we are satisfied that the parties indeed wished to entrust regulatory matters -- disputes calling for the application of social and economic legislation -- to their arbitrators; does any overriding policy prevent them from doing so? ["No"; this is *Mitsubishi*.]; (b) Suppose that the arbitrators have been asked to construe an agreement to determine the intention of the parties, and in doing so have allowed their judgment to be determined -- not by any process of textual interpretation -- but by considerations of extrinsic social "policy"; have they acted legitimately? [Apparently "no" under *Stolt-Nielsen*.] As I argue in the text, this answer to "(b)" seems wrong, but at least it's a totally discrete inquiry, one that does not in any sense call "(a)" into question.

¹²⁹ *Cf.* Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, *supra* in this issue at 323, 342 n.107 (the *Stolt-Nielsen* majority "borrowed, for the first time in a commercial arbitration decision by the Court, and somewhat anachronistically, [this] maxim from the collective bargaining realm," and so this "principle of labor arbitration must now be regarded as a part of the law surrounding FAA Section 10(a)(4)"); Moses, *supra* note 128 (the Court "drew upon a standard from labor arbitration rather than from commercial arbitration"; this "labor arbitration standard" "does not appear to be very different from a finding that the arbitrator improperly applied the law").

¹³⁰ [Advest, Inc. v. McCarthy, 914 F.2d 6, 10 \(1st Cir. 1990\).](#)

¹³¹ Rau, *Culture*, *supra* note 50, at 531. To the same effect -- although using the conventional language of "interpretation" -- is [Hill v. Norfolk and Western Ry. Co., 814 F.2d 1192, 1194-95 \(7th Cir. 1987\)](#) (Posner, J.) (the question "is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract"; a party can only complain if the arbitrators "disregard the contract and implement their own notions of what is reasonable and fair"); [Wise v. Wachovia Securities, LLC 450 F.3d 265, 269 \(7th Cir. 2006\)](#) (Posner, J.) ("the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them").

- ¹³² “However natively wrapped, the packages are fungible.” *Advest, Inc.*, 914 F.2d at 9. The canonical “draws its essence” formula originated of course in the first, “*Steelworkers*” “trilogy,” *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (“an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement”). Among the many non-labor cases that have since found it to be helpful, going back to the time immediately following *Steelworkers*, see *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961) (charter party; “manifest disregard” “is the sort of thing the Court had in mind” in its language in *Steelworkers*); *Bosack v. Soward*, 586 F.3d 1096 (9th Cir. 2009) (claim of breach of fiduciary duty against former investment manager and general partner; arbitrators “exceed their powers” when they express a “manifest disregard of law,” or when they issue an award that is “completely irrational” -- and an award is “completely irrational” where it “fails to draw its essence from the agreement”); *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461-62 (8th Cir. 2001) (proper price for delivered corn; “an award will only be set aside where it is completely irrational or evidences a manifest disregard for the law,” and it “may only be said to be irrational where it fails to draw its essence from the agreement”).
- ¹³³ *E.g.*, Rau, *Culture*, *supra* note 50, at 531 (“suppose that an arbitrator has been entrusted with the task of valuing a party’s shares in a close corporation, and that he has been told to value the business ‘as a going concern in the light of past, present and prospective future earnings and the net worth of said business’”; however, “it can be shown that he did not even bother to obtain any operating figures or net earnings for the previous five years, and that he did not capitalize prospective earnings”).
- ¹³⁴ *E.g.*, *Roadway Package System, Inc.*, 257 F.3d at 301 (arbitrator was asked to determine “whether the termination of [an independent contractor] was within the terms of this Agreement,” but he instead framed the question as “whether the termination was wrongful or proper,” and his award “makes crystal clear that [his] decision was based on the fact that he thought [the respondent’s] procedures for notifying [claimant] of its dissatisfaction with his performance were unfair”; the arbitrator thus “ruled on an issue that was not properly before him”).
- ¹³⁵ See, *e.g.*, *Edstrom Industries, Inc. v. Companion Life Ins. Co.*, 516 F.3d 546, 553 (7th Cir. 2008) (Posner, J.); see also *id.* at 552 (“if they tell him to apply Wisconsin law, he cannot apply New York law”). The arbitrator in *Edstrom* did not actually go quite so far -- but although the contract directed that he “strictly apply Wisconsin law,” it appeared to the court that “he seems not to have interpreted it at all but merely to have ignored it” -- “it is unrealistic to think that the arbitrator was even *trying* to interpret Wisconsin law.” (emphasis in original) *Id.* at 552-53. So the award was vacated. See also *N.Y. Tel. Co. v. Communications Workers of Amer.*, 256 F.3d 89 (2d Cir. 2001) (“perhaps,” the arbitrator had written, “it is time for a new court decision”).
- ¹³⁶ See text accompanying note 125 *supra*.
- ¹³⁷ *Stolt-Nielsen*, 130 S. Ct. at 1768.
- ¹³⁸ See text accompanying notes 21-22, 32 *supra*; *cf.* Rau & Sherman, *supra* note 75, at 114 (statutes permitting court-ordered consolidation in the interest of efficient case administration and in the absence of a contrary agreement).
- ¹³⁹ *Stolt-Nielsen*, 130 S. Ct. at 1768 (because the agreement was “silent,” “the arbitrators’ proper task was to identify the rule of law that governs in that situation”); *id.* at 1770 (“instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers”).
- ¹⁴⁰ *Cf.* *Robbins v. Day*, 954 F.2d 679, 684 (11th Cir. 1992) (the burden is on the party seeking to overturn the award to refute “every rational basis upon which the arbitrator could have relied”); *Perini Corp. v. Grete Bay Hotel & Casino, Inc.*, 129 N.J. 479, 534-35, 610 A.2d 364, 392 (1992) (Wilentz, C.J., concurring) (“there are no reasons, no findings of fact, no conclusions of law ... For all we know, the arbitrators concluded that the sun rises in the west, the earth is flat, and damages have nothing to do with the intentions of the parties or the foreseeability of the consequences of a breach”).
Cf. Rau, *Culture*, *supra* note 50, at 513-14 (an arbitrator’s ability to render a “naked award” may have “an important positive effect,” maximizing “his freedom from overbroad rules or time-honored categories, which might otherwise appear to dictate a result he would prefer to avoid”; conversely, “any attempt to impose reasoned awards on arbitrators will be motivated at least in

part by the desire to expand judicial supervision of the process”).

¹⁴¹ [Stolt-Nielsen](#), 130 S. Ct. at 1775.

¹⁴² [Edstrom Industries, Inc.](#), 516 F.3d at 553.

¹⁴³ “Default rules” in adjudication can be crafted by the decision-maker as an attempt to “mimic” the contracting parties’ hypothetical bargain, or to track their tacit assumptions -- or such rules can be crafted, more simply and directly, in overt response to concerns of efficiency and fair play. *See generally* the text accompanying notes 99-110 *supra*. None of this is remotely akin to suggesting that “mere silence” can itself “constitute consent” to class-wide proceedings. *Cf.* the Court’s opinion at [Stolt-Nielsen](#), 130 S. Ct. at 1776. Such a suggestion -- at least if advanced as a true inference of actual intent, as opposed to the conscious choice of a rebuttable presumption -- cannot be taken seriously; it is not what the arbitrators did, nor is it what any reasonable arbitrator would do. Of course the converse assertion -- that “mere silence” “constitutes” an intention to *exclude* class-wide proceedings -- is equally wide of the mark, and for the same reasons, *see* note 103 *supra*; *cf.* [Stolt-Nielsen](#), 435 F. Supp. 2d at 387 (respondent argued that “the failure of a contract to include such a term means that the parties did not intend to include it”). On the relevance of “silence” below, *see also* text accompanying notes 74-77 *supra*.

¹⁴⁴ *See* Rau, “Consent,” *supra* note 53, at 139 (once there is “an agreement in which arbitrators have been selected and entrusted with the power to do something,” the inquiry then turns to “what the parties could reasonably have expected to be within the authority of ‘their’ arbitrators,” and “at the core of any mandate would naturally be matters touching on the appearance of the process and the conduct of the hearings”); [Bazzele, Oral Argument, supra note 31, 2003 WL 1989562 at *25-26](#) (Justice Scalia: “they don’t consent to every jot and tittle of means by which the arbitration will be conducted; they consent in a gross kind of way to arbitration or nonarbitration, and -- and that’s -- that’s what their consent makes the difference. between, but they don’t consent to every consequent detail that enters into the actual conduct of the arbitration”); LCIA ARBITRATION RULES, Art. 14.2 (unless otherwise agreed by the parties, “the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable”). *Cf.* [Colfax Envelope Corp. v. Local No. 458-3M](#), 20 F.3d 750, 754 (7th Cir. 1994) (Posner, J.) (“when parties agree to a patently ambiguous term, they submit to have any dispute over it resolved by interpretation. That is what courts and arbitrators are *for* in contract cases”; “we would have a different case if the ambiguity were over whether the parties had [ever] agreed to arbitrate their disputes [at all]”) (emphasis in original). Note that we are talking here about the broad party-delegated authority of arbitrators to construe contracts and to devise appropriate default rules. It does not seem quite right to suggest that we should imply limits on this authority -- that we should presume it to be less than plenary -- merely on the ground that the AAA “class rules” caution arbitrators that when they exercise it, they ought not to be influenced one way or the other by the fact that the rules exist. *See* the discussion at note 44 *supra*. On the contrary: The rules merely emphasize, through an abundance of caution, that agreement to them is not in itself probative of an agreement to class-wide arbitration -- that a thumb is not to be placed on the scales -- for it would obviously be inappropriate to bootstrap a simple grant of authority into a preference for judgment to be exercised in any particular way; that would be to conflate a question going to the merits with the issue of the appropriate decisionmaker. *But cf.* [Drahozal & Rutledge, supra note 88](#), at 1152 (while “most arbitration rules” “grant arbitrators broad discretion to manage the arbitration proceeding,” this provision of the AAA class rules prevented the Supreme Court in *Stolt-Nielsen* from “rely[ing] on the general procedural authority of arbitrators as a basis for finding that the institutional rules agreed to by the parties overrode the negative gap-filler”).

¹⁴⁵ *E.g., Sidhu, supra note 85*; [Genus Credit Management Corp. v. Jones](#), 2006 WL 905936, at *1-3 (D. Md. Apr. 6, 2006) (arbitrator determined that the agreement “was ambiguous as to class arbitration and should be interpreted against the drafter”; held, “it cannot be argued in any respect -- as is plaintiff’s burden -- that [the arbitrator’s] interpretation fails to draw its essence from the contract”).

¹⁴⁶ *E.g., Empire Rubber Mfg. Co. v. Morris*, 65 A. 450, 453 (N.J. Err. & App. 1906) (“it is the last to be resorted to -- a rule never to be relied upon except where other rules of construction fail”). One could realistically go somewhat further and suggest that it serves most often as little more than a makeweight, wheeled out to bolster a result already reached and chosen for more functional purposes: This seems to be exemplified by [Mastrobuono v. Shearson Lehman Hutton, Inc.](#), 514 U.S. 52, 62 (1995) (the strong “federal policy favoring arbitration” requires that arbitration agreements be “generously construed” and thus requires “an unequivocal exclusion” of punitive damages; “moreover, respondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it”).

¹⁴⁷ The *locus classicus* is Ian Ayres & Robert Gertner, [Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules](#), 99 YALE L.J. 87 (1989). On understanding *Hadley v. Baxendale* through this optic, see *id.* at 101-04 (the *Hadley* default can “be understood as a purposeful inducement to the miller as the more informed party to reveal that information to the carrier,” which “creates value because if the carrier foresees the loss, he will be able to prevent it more efficiently”). On understanding *contra proferentem* through this optic, see [Hamischfeger Corp. v. Harbor Ins. Co.](#), 927 F.2d 974, 976 (7th Cir. 1991) (Easterbrook, J.).

¹⁴⁸ BURTON, *supra* note 99, at 188.

¹⁴⁹ CORBIN ON CONTRACTS, *supra* note 104, at 306. See also [RESTATEMENT, SECOND, CONTRACTS § 206](#) cmt. a (the drafting party is “more likely than the other party to have reason to know of uncertainties of meaning” and may indeed “leave meaning deliberately obscure”); “sometimes the result is hard to distinguish from a denial of effect to an unconscionable clause”; Zamir, *supra* note 106, at 1724-25 (“this established rule may be justified on grounds of personal responsibility, fairness, efficiency and redistribution”; “some of these ends, like the reallocation of power and wealth between the parties, represent distinctively social values”).

Professor Horton has suggested an alternative rationalization -- that “the doctrine is better understood as encouraging uniformity of meaning in mass produced contracts,” allowing firms to “reap the benefits of standardization” and consumers to “pay a price that reflects these savings”; without it, standardized terms would “mean different things to different consumers -- a result that would tear the fabric of contract law.” David Horton, [Flipping the Script: Contra Proferentem and Standard Form Contracts](#), 80 U. COLO. L. REV. 431, 438, 474 (2009). Whatever the merits of this approach it will be noted that it does not, any more than traditional notions, rest on any attempt to ascertain true “intention.”

¹⁵⁰ See text accompanying notes 60-61, 83 *supra*; [Stolt-Nielsen](#), 130 S. Ct. at 1776 n.10 (“We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration”).

¹⁵¹ See text accompanying note 84 *supra*.

¹⁵² [Stolt-Nielsen](#), 130 S. Ct. at 1770.

Now if we are indeed convinced that a class-wide arbitration would not be in “in accordance with the terms of the agreement,” then such a proceeding could not be compelled, and could indeed be enjoined, see Alan Scott Rau, [Understanding \(and Misunderstanding\) “Primary Jurisdiction,”](#) 21 AM. REV. INT’L ARB. 47, 114-30 (2010); any actual award at any stage could be vacated under § 10(a)(3) or (4). See 2 BORN, *supra* note 66, at 2595 (“in jurisdictions where no statutory provision directly addresses the subject, courts have nonetheless held that arbitral awards are subject to annulment if the arbitrators fail to observe the procedures agreed by the parties”). The thrust of the argument in the text is that the Court’s holding to this effect, because it interferes with what is usually taken to be the adjudicative authority of arbitrators, is deeply flawed. Still, *given the premise*, and so given an order of vacatur,

- a remand, or

- allowing the parties to “arbitrate again” -- on anything other than an individual basis -- would certainly be pointless.

Professors Drahozal and Rutledge suggest that when the Court proceeded to decide the matter itself, it “badly misconstrued § 10(b),” which after all “says nothing about a court having the option to go ahead and decide an issue for itself if it does not remand to the arbitrators, whether only one outcome is possible or not.” Drahozal & Rutledge, *supra* note 88, at 1150-51 (“if the parties’ first effort to arbitrate their dispute fails because a court vacates the award, the parties are free to arbitrate again”). I am not quite sure about this as statutory analysis: Section 10(b) would not after all prevent a court from vacating an AAA award, on the ground that the parties had only agreed to arbitrate before the ICC -- and then proceeding to decide the proper forum “itself” as a matter of law; by the same token, if “a court is convinced that it would be most congruent with the overall intentions of the parties” that an arbitration should take place elsewhere, it may vacate an award rendered locally, or may conclude that arbitral proceedings threatened locally ought to be enjoined -- and as part of this process it will determine the proper forum “itself” as a matter of law. See the discussions in Rau, *supra*, 21 AM. REV. INT’L ARB. at 154, and in Rau, “Consent,” *supra* note 53, at 140 & n.217. In all these cases there may indeed be an “enforceable agreement,” but the issue in question (different in that respect from “the merits”) will be deemed entirely outside the purview of the arbitrators themselves.

Nevertheless the essential fact is that all of us are appalled by *Stolt-Nielsen*, and so I suspect our differences regarding the form of the argument are not deep but little more than semantic quibbles.

- ¹⁵³ See text accompanying notes 85-88 *supra*, and notes 85, 88 *supra*.
- ¹⁵⁴ Cf. Samuel, *supra* note 61, at 37 (“one can ... infer from the [Stolt-Nielsen] opinion that the arbitrators’ decision on class arbitration would have been upheld” in those circumstances).
- ¹⁵⁵ Cf. Strong, *supra* note 126, at 54-55.
- ¹⁵⁶ See *Stolt-Nielsen*, 130 S. Ct at 1782-83 (Justice Ginsburg, dissenting; while “the Court does not insist on express consent to class arbitration,” it nevertheless “apparently demands contractual language one can read as affirmatively authorizing class arbitration”); *Stolt-Nielsen*, Oral Argument, *supra* note 45, 2009 WL 4662509 at *34 (Justice Scalia: “you don’t have to agree to prohibit everything in a contract. You have to agree to permit it. That’s what contracting is about”). Whether this as a practical matter does meaningfully dispense with the need for some particularly explicit contractual provision, may well be questioned; cf. *AT&T Mobility LLC v. Concepcion*, Oral Argument, 2010 WL 4472577 at *40 (Justice Ginsburg: “in *Stolt-Nielsen* this Court said that, absent express consent, no class arbitration”).
- ¹⁵⁷ In the years between *Bazze* and *Stolt-Nielsen* the canonical “broad arbitration clause,” coupled with a presumption against the drafter, sufficed -- in almost every clause construction award under AAA rules -- to entitle the claimant to a “presumption and construction” in favor of class-wide arbitration; see, e.g., *Terrapin Express Inc. v. Airborne Express, Inc.*, AAA 11-199-015356-05, Clause Construction Award (May 9, 2006) (“to the extent that the real intention was to prohibit class arbitration, Respondents could have easily said so explicitly. If anything, their failure to do so signifies the opposite, i.e., that the intention of the parties was to permit class arbitration.”). This and other awards are at www.adr.org. See generally Brief of AAA as Amicus Curiae, *supra* note 42, 2009 WL 2896309 at *22 (in the first six years that the AAA’s Class Rules were in effect, 135 clause construction awards were rendered, and of these only 5% held that “the arbitration clause did not permit the arbitration to proceed on behalf of a class”). The arbitrators in *Stolt-Nielsen* itself were perhaps not atypical in relying heavily on past arbitral experience as precedent, thereby bootstrapping themselves into a desirable job. See *Stolt-Nielsen*, 548 F.3d at 89-90 (“the panel based its decision largely on the fact that in all twenty-one published clause construction awards issued under [the AAA rules], the arbitrators had interpreted silent arbitration clauses to permit class arbitration”).
- ¹⁵⁸ See, e.g., *Maslo v. Oak Pointe Country Club, Inc.*, AAA Case No. 11-181-02243-06, Amended Clause Construction Award (June 15, 2010) (“being unable to presume such intent [to “affirmatively agree to class arbitration”] from the broad language of the arbitration clause, as instructed by *Stolt-Nielsen*, ... the reasoning set forth in the original Clause Construction Award is no longer tenable as a matter of law and must be reversed”). Of course what I have said in the text does not take account of the inevitable instances where *Stolt-Nielsen* will be read either negligently or disingenuously. One of these alternatives -- I suspect the latter -- is clearly exemplified by *Benson v. CSA-Credit Solutions of America, Inc.*, AAA Case No. 11-160-M-02281-08, Partial Final Clause Construction Award, (July 6, 2010). Here the arbitrator thought that he remained free to look at “the substantive law of Texas [applying] to the interpretation of the arbitration agreement”; he then managed to find authorization for class-wide proceedings in the good old canon of *expressio unius*: For since the parties had ruled out arbitration for *trade secret disputes*, they “knew how to exclude certain disputes from the scope of the arbitration agreement, but apparently chose not to exclude collective and class arbitrations” -- despite the fact that it was “not uncommon” for other parties to do so in other agreements. No gold star for noting that this not only ignores the default rule prescribed by the Court in *Stolt-Nielsen* -- it actually appears to reverse it. Of the 11 initial clause construction awards that have been rendered following *Stolt-Nielsen*, four appear to have found that class-wide proceedings were authorized by the contract, uniformly as a result of equivalent interpretive flights of fancy. So once again Captain Corcoran’s concession in *Pinafore* seems apt: If not absolutely “never,” then “hardly ever.”
- ¹⁵⁹ *Stolt-Nielsen*, 130 S. Ct. at 1775-76.
- ¹⁶⁰ Cf. Strong, *supra* note 126, at 42, 47 (attempting “to identify a universally acceptable definition of arbitration that can be used ... to determine whether class arbitration does, in fact, ‘change the nature of arbitration’”).
- ¹⁶¹ See generally the discussion in Rau, *Culture*, *supra* note 50, at 466-508. Cf. PHILIPPE FOUCHARD ET AL., TRAITÉ DE L’ARBITRAGE COMMERCIAL INTERNATIONAL 15 (1996)(a “comparative law study will indicate that the distinctions of

French law [with respect to the question whether we ‘are in the presence of a true arbitration’] are not observed with quite the same rigor in certain other legal systems”).

¹⁶² It was obviously in play in *Bazzle* as well, a case that was in many respects a dress rehearsal for *Stolt-Nielsen*; see Oral Argument, [supra](#) note 31, 2003 WL 1989562 at *47 (Justice Souter: “without judicial review, would we have rolled the dice for \$27 million on one arbitrator? What is your answer to that, that ... it is just too implausible to draw this conclusion out of the limited consent that they gave?”).

¹⁶³ The arbitral tribunal in *Stolt-Nielsen* acknowledged that it was undisputed that “these arbitration clauses have never been the basis of a class action”; see generally note 33 *supra*. Justice Alito’s opinion summarizes, in a long footnote, extensive “expert evidence from experienced maritime arbitrators,” “demonstrating that it is customary in the shipping business for parties to resolve their disputes through bilateral arbitration,” see [Stolt-Nielsen](#), 130 S. Ct. at 1769 n.6 (“in the view of the London Corps [sic] of International Arbitration, class arbitration is ‘inconceivable’”).

This strong inertia supporting individualized proceedings makes me extremely skeptical of any argument to the effect that in the few years since *Bazzle*, publication of “specialized rules concerning class procedure in arbitration,” and “numerous workshops and seminars on class arbitration,” should reassure us that “enough time has passed to ensure that surprise is no longer an issue.” Cf. Strong, *supra* note 41, at 1077 (parties “have had time to research and amend existing language so as to forestall the possibility of class arbitration, if so desired”). This is at best a counsel of perfection, and at worst, mere bootstrapping: I should think commercial parties would need a somewhat longer window -- and a few bad experiences -- before they are forced to abandon any assumption that “their” arbitrators would be more sensible and more sensitive to common practice.

¹⁶⁴ We will not, then, see any carving out of an exemption from *Stolt-Nielsen* for the case of contracts of adhesion. There seems little room indeed in the Court’s cramped view of what “attention to the will of the parties” means, for any class-wide order in cases of “silence” to be tolerated. Immediately following the *Stolt-Nielsen* decision some writers did gamely suggest that the door had been left open for a different treatment for consumer and employment contracts, see, e.g., [Stolt-Nielsen](#), 130 S. Ct. at 1783 (Ginsburg, J., dissenting; “the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis”); Strong, *supra* note 86, at 567 (“there is sufficient room for argument that the opinion does not go so far”). But it seems, to put it mildly, hard to maintain this position now in light of the more recent decision in *Concepcion*, *supra* note 4: Here, on its way to a conclusion that a state may not condition the enforceability of an arbitration agreement in a consumer case on the availability of class-wide relief, the Court closely tracks the argument of *Stolt-Nielsen*: “We find it unlikely that in passing the FAA Congress meant to leave the disposition of [the] procedural requirements [of class arbitration] to an arbitrator”; since “arbitration is poorly suited to the higher stakes of class litigation,” “we find it hard to believe that defendants would bet the company with no effective means of review.” *Id.* at 1750-52.

¹⁶⁵ Whatever the systemic benefits of aggregate litigation (cf. Strong, *supra* note 41, at 1048-49 (identifying the advantages of “efficiency,” extending also to “unnamed claimants” and to “society as a whole,” as well as of “promoting social justice”)), the very fact that contracting parties will rarely structure their transactions so as to subject themselves to class-wide liability -- and can be expected to immediately opt out of any general background rule that does so -- suggests that this may be a “majoritarian default.” Even the notorious “stickiness” of default rules does not seem to have prevented strenuous attempts to “contract around” *Bazzle*.

¹⁶⁶ It is thus quite different in this respect from proposals

- to structure our positive law of civil procedure so as to restrict the discretion of the individual judge (e.g., Robert G. Bone, [Who Decides? A Critical Look at Procedural Discretion](#), 28 CARDOZO L. REV. 1961, 1963 (2007) (questioning “the efficacy of case-specific discretion” and “urg[ing] rulemakers to draft rules with more constraints”)), or proposals
- to draft arbitral rules so as to restrict the discretion of the individual arbitrator (e.g., William W. Park, *Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT’L 279, 283 (2003) (“the benefits of arbitrator discretion are overrated”)).

However interesting, both of these are systems-design proposals that in seeking to reorder endogenous preferences, don’t require us to look outside the black box of a given institution: They both then elide the Question of Questions here -- the extent to which the state is justified in interfering with a parallel system of private justice, by imposing on contracting parties a requirement of “clear statement” in the interest of cabining private decision-makers. There are no externalities here that I can identify. Cf. Drahozal & Rutledge, *supra* note 88, at 1162-64 & n.214 (discussing these articles and noting, with respect to the latter, that since it does not argue for “national legislation,” in effect it is “participating in the market to make it perform better, rather than seeking a legislative change because the market is not functioning well”).

¹⁶⁷ Professors Drahozal and Rutledge are, I think, making a similar point when they term the *Stolt-Nielsen* default rule “heavy handed.” *Id.* at 1165.

¹⁶⁸ With respect, for example, to

- the “waiver” of the proponent’s right to arbitration; *see* Rau, “Waiver,” *supra* note 22, at 261-79;
- the consolidation of related proceedings; *see* Rau & Sherman, *supra* note 75, at 108-18;
- the legal immunity of arbitrators; *see* Rau, *Culture*, *supra* note 50, at 505-07;
- the power of contracting parties to stipulate with respect to “expanded judicial review”; *see* Rau, *supra* note 119; *but cf.* Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT’L ARB. 469 (2006);
- the “separability” of the arbitration clause; *see* Rau, “Separability,” *supra* note 1, at 29-37;
- the questions, “who decides what types of disputes I am obligated to arbitrate?” and “who decides with whom I am obligated to arbitrate?”; *see* Rau, “Consent,” *supra* note 53, at 87-135.

The last of these reminds us of a more general proposition -- that our current assumptions as to the allocation of authority between courts and arbitrators are very much subject to reversal by the contracting parties themselves. *See* Rau, “Arbitrability,” *supra* note 11, at 293-95. This is of course the subject of *Rent-A-Center West, Inc.*, *supra* note 3, to be discussed imminently.

¹⁶⁹ *See* notes 22, 75 *supra*. *See also* [Government of the United Kingdom v. Boeing Co.](#), 998 F.2d 68 (2d Cir. 1993) (“if contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are a party”); [Coastal Shipping Ltd. v. Southern Petroleum Tankers Ltd.](#), 812 F. Supp. 396, 403 (S.D.N.Y. 1993) (“the absence of explicit language or other indicia that [the parties] intended to consolidate their disputes leads this Court to conclude that the parties did not consent to joint arbitration”).

¹⁷⁰ *See* [New England Energy Inc. v. Keystone Shipping Co.](#), 855 F.2d 1, 5 n.2 (1st Cir. 1988) (state statute provided that a court may order the consolidation of “one arbitration proceeding with another or others”; “state law may supplement [the FAA] in matters collateral to the agreement to arbitrate”); [Blue Cross of California v. Superior Court](#), 78 Cal. Rptr.2d 779, 79 (Cal. App. 1998) (“when the arbitration agreement between the parties is silent as to classwide arbitration and state law specifically authorizes it in appropriate cases,” an order does not “contravene the policy behind the [FAA]”). The Revised Uniform Arbitration Act, increasingly an irrelevant relic, still provides in § 10 that “upon [motion] of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims”).

¹⁷¹ *Stolt-Nielsen* involved antitrust claims arising out of maritime transactions -- but none of that seemed to have much of an effect on the outcome (other perhaps than to raise doubts with respect to the true expectations of the parties grounded in maritime “custom and usage,” *see* notes 33, 163 *supra*). It is certainly hard to perceive why either the applicable substantive law or the resulting fact of federal jurisdiction should play any role at all in assessing the extent of arbitral power under the FAA. In his decision, Justice Alito intimated strongly that federal courts even in diversity cases had no reason to defer to any contrary state-law default rule with respect to class-wide proceedings, *see id.* 130 S. Ct. at 1772 (“while the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion”).

One can go further: Remember *Bazzele*? True, no single rationale emerged there to command the approval of five Justices, and nothing much seems to remain, these days, of *Bazzele*’s insistence on deference to arbitral determinations; *see* text accompanying notes 38-40, & note 63 *supra*. But as we have seen, there was nevertheless an overwhelming majority there for the proposition that the FAA controls the question of when class-wide proceedings could be ordered -- *to the point that the courts of South Carolina would be expected to abandon their state-crafted default rule*. *Stolt-Nielsen* itself seems to swim in the same current of thought as Justice Rehnquist’s dissent in *Bazzele* -- although this time it is arbitrators, rather than state courts, who are reprimanded for presuming to order arbitration other than in accordance with the expressed wishes of the parties. *Cf.* note 32 *supra*.

¹⁷² *Cf.* [Securities Industry Ass’n v. Lewis](#), 751 F.Supp. 205 (S.D. Fla. 1990), in which a state statute required that any agreement between a securities dealer and customer must provide the customer with “the option of having arbitration before and pursuant to the rules of the [AAA] or other independent nonindustry arbitration forum as well as any industry forum”; a suit to challenge the statute’s constitutionality was successful: “This type of legislative encroachment” was held to be preempted by virtue of both § 2 and § 5 of the FAA; presumably a request to compel arbitration before the AAA over the broker’s objection would have run afoul of § 4; an award rendered under AAA auspices would equally be subject to vacatur under § 10. *See* note 152 *supra*.

What was apparently impermissible about the state’s position there is that it “prevented the stronger party in a contract of adhesion from imposing in advance a certain term (industry forum arbitration) on the weaker party -- although the power to do this in other,

non-arbitration agreements remains generally unconstrained.” Rau, *State Arbitration Law*, *supra* note 22, at 415, 425. *See also* Stipanowich, *supra* note 129, at 337 (is there now a “second tier” of substantive arbitrability law that “sets federal boundaries regarding the nature and scope of consent to arbitrate?”).

¹⁷³ *See Concepcion*, 131 S. Ct. at 1744, 1748, 1753. If, as *Concepcion* puts it, the FAA

- “prohibits states” from insisting on class-wide proceedings as a condition of enforcement -- if state law to that effect is “preempted” because this would somehow denature arbitration, then,
- I should think it most unlikely that state courts remain free instead to “nudge” the parties in the direction of class proceedings, by prescribing a similar “default rule” in cases of “silence” -- even though here, in theory, the interference with state law would be less extensive and reversible.

See also Rau, *State Arbitration Law*, *supra* note 22, at 432 (state law as “gap filler”; “even if a uniform federal rule has not yet developed, the courts must still ask whether the state’s background rule will ‘effectuate federal policy’ and whether it is a plausible candidate for incorporation into federal common law”).

¹⁷⁴ It has been suggested that still another federal policy, also tending to a preemptive role for federal law, underlies *Stolt-Nielsen*. Given that class actions are “anomalous” in the eyes of most other legal cultures -- we see a “steadfast refusal” abroad “to countenance the disposition of claimants’ rights without their affirmative consent” -- any background rule of class-wide proceedings might create conflict with the “public policy” of other states -- thereby “impeding” or endangering the foreign recognition and enforcement of American awards. *See* Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, Vanderbilt University Law School Working Paper Number 10-34 (2011) at pp. 29-31, available at <http://ssrn.com/abstract=1670722>; Stipanowich, *supra* note 129, at 334-35.

Now I am largely agnostic with respect to the extent of such a risk of non-recognition, *cf.* S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT’L L. 1, 72-73 (2008), who argues that “states that would otherwise be hostile to class arbitration may find consumer arbitrations less objectionable, since that is an area where an increasing number of national ... legislatures have created a form of representative action.” (*Sed quaere* whether this takes adequate note of the inarbitrability in many states of consumer contracts generally -- an objection going, not necessarily to the legitimacy of representative actions, but to the notion of *any arbitration at all to which a consumer is bound*). In any event, though, I am not sure why it is thought at all important that that particular tail should serve to wag this dog.

¹⁷⁵ *First Options of Chicago, Inc.*, *supra* note 11 (company president argued that he had never consented in his individual capacity to allow arbitrators to determine the merits of the dispute; the Court held that he had not “submitted” this “arbitrability” challenge to the arbitrators merely by arguing the point before them).

¹⁷⁶ *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968).

In *Bazzele*, the Court did vacate a state court’s confirmation of the award, but only because -- with respect to the critical question of whether class-wide proceedings were authorized -- “the parties have not yet obtained the arbitral decision that their contracts foresee”; the case was remanded “so that the arbitrator may decide the question of contract interpretation.” 539 U.S. at 453-54. Efforts to characterize a measure as “pro-arbitration” or “anti-arbitration” are as often as not simplistic and naive, *see* Rau, “*Waiver*,” *supra* note 22, at 270-71 (“waiver”; do courts “favor” the arbitration process “by staying litigation and moving the parties into arbitration whenever they have a chance to do so? Or do they ‘favor’ arbitration by creating incentives for the parties to initiate the process at the earliest possible moment, rather than allowing litigation to proceed?”). But it is not seriously open to argument that *Bazzele* falls securely in the former category.

¹⁷⁷ The last piece of the puzzle was the question whether an *individual* arbitration proceeding can serve as an adequate shield against *class litigation* -- something to be tested in the *Concepcion* decision the following year.

The labor correspondent for the *New York Times* writes that a recent Supreme Court decision has “set higher barriers for bringing many types of nationwide class actions against a large company with many branches,” and so will “make it harder to bring big, ambitious employment class-action cases” -- in consequence “the ruling was widely hailed by business groups, some of which filed amicus briefs urging the Court to limit class actions.” No, wait, sorry, the reference is not to *Stolt-Nielsen* or *Concepcion*, but to *Wal-Mart Stores, Inc. v. Dukes*, 2011 WL 2437013 (U.S., June 20, 2011); Steven Greenhouse, *Heavy Blow for Big Cases and Lawyers Who Bring Them*, N.Y. TIMES, June 21, 2011, at B1.

¹⁷⁸ The Court’s aversion to class-wide proceedings may thus be the impetus for *Stolt-Nielsen* and, at the same time, its limiting principle. For example, *Stolt-Nielsen* might plausibly be read as falling short of a prohibition of arbitral orders of consolidation; if such orders do not implicate to the same degree the concerns expressed by the Court, *Bazzele* is left intact. *See* *Safra Nat’l Bank of*

[N.Y. v. Penfold Investment Trading, Ltd.](#), 2011 WL 1672467 at * 5 (S.D.N.Y. April 20, 2011) (“joinder and consolidation remain distinct procedural issues of the sort parties would intend for the arbitrator to decide”). At the very least the differences may be such as to affect the calculus of “likelihood of success on the merits” for the purpose of evaluating requests for preliminary injunctions against arbitral proceedings. *E.g.*, [Anwar v. Fairfield Greenwich Ltd.](#), 728 F. Supp. 2d 462, 477-78 (S.D.N.Y. 2010) (“no parties are absent,” and “only 24 investment accounts held by 38 parties are at stake in the arbitration”). *Cf.* [Jetblue Airways Corp. v. Stephenson](#), 931 N.Y.S.2d 284, 289 (A.D. 2011) (demand characterized “as one for joint, or collective arbitration”; “unlike in a class arbitration, all of the affected pilots are actual parties,” and thus the proceeding demanded “is not, like a class proceeding, so fundamentally different from an ordinary arbitration”; *held*, “the arbitrators should decide the issue”).

¹⁷⁹ Stipanowich, *supra* note 129, at 342. So I find somewhat exaggerated the fears expressed by Aksen, *supra* note 128, at 53 (*Stolt-Nielsen* “contains enough dictums to jeopardize the finality of commercial arbitration awards in general”). To the extent that the *Bazze* decision has been marginalized -- seriously undercut but not overruled, *see* note 63 *supra* -- *Stolt-Nielsen* is, however, likely to cause further muddle: In particular, it is likely to create uncertainty as to the relationship between the closely related concepts of “arbitral jurisdiction” and “unreviewable arbitral discretion.” The two have always been tightly interdependent -- two sides of the same coin; this is the point of my discussion throughout of *Bazze*, and of *Pacificare*, and of *First Options*; *see* text accompanying notes 53-57 & note 57 *supra*; and text accompanying notes 208-15 *infra*. Whatever else is portended by *Stolt-Nielsen*, the Court there has clearly gone some distance towards uncoupling them.

¹⁸⁰ In the universe of arbitration cases “unconscionability” has become the inevitable doctrinal weapon of choice to stave off an obligation to arbitrate; *see* Aaron-Andrew Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1440-41 (2008) (“where unconscionability challenges once appeared in less than 1% of all arbitration-related cases, more recently they have appeared in 15-20% of all cases involving arbitration”). And conversely, in the entire universe of “unconscionability” cases, the overwhelming majority of challenges these days arise as defenses to arbitration; *see* Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 622 (2009) (the “total number of reported unconscionability decisions” increased “nearly tenfold” between 1990 and 2008, and “those involving arbitration clauses accounted for the lion’s share of the overall increase”); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194 (2004) (“in 2002-2003 litigants raised issues of unconscionability in 235 cases,” of which “161, or 68.5%, involved arbitration agreements”); Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006) (reviewing two decades of California appellate cases; of 160 cases in which a contractual provision was challenged for “unconscionability,” 114 (or over 70%) involved challenges to an arbitration agreement).

¹⁸¹ In the summer of 2009 it was revealed that the NAF, a leading (and disturbingly entrepreneurial) arbitration provider -- in fact, “America’s biggest arbitrator of consumer credit card disputes” -- had close corporate ties and common ownership with a major debt-collection business -- one indeed “that collects debts in some of the same cases.” *See generally*, Carrick Mollenkamp et al., *Turmoil in Arbitration Empire Upends Credit-Card Disputes*, WALL ST. J., Oct. 14, 2009, at A1. The Minnesota Attorney-General brought proceedings against NAF alleging consumer fraud, deceptive trade practices, and false advertising; *see* State of Minnesota v. NAF (July 14, 2009), ¶¶ 2, 91 (“the consumer does not know -- and the Forum hides from the public -- that the Forum is financially affiliated with a New York hedge fund group that owns one of the country’s major debt collection enterprises”; “the Forum aggressively promotes its arbitration services to corporations as a collections tool, but conceals this from consumers”). “Without admitting the charges,” the NAF immediately withdrew from the consumer arbitration business. Whatever the merits -- and however reluctant we might be to generalize from this affair to the behavior of the arbitration establishment as a whole -- the whole sad episode is unseemly, if not indeed seamy. So I do find it rather poignant that these revelations happened to coincide, almost to the day, with the hard-copy publication by Professor Carbonneau of an article in which he stirringly defended the Forum against the “contempt” and “defamatory characterizations” leveled at it during some academic conference: As the NAF is “acutely aware of the need to maintain the integrity and professionalism of its adjudicatory tribunals[, i]t could not, and would not, continue to survive as a player by supplying corrupt services that favor the stronger of two parties”; “it is inconceivable that this would-be [sic] wholesale corruption of the arbitral process should escape the attention of the courts.” Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 396, 406-08 (2009).

¹⁸² I told him I was going on a first visit to Paris, and he warned me against a possible disappointment ... “Do not,” he said, “allow yourself to be ‘put off’ by the superficial and external aspect of Paris; or rather (for the *true* superficial and external aspect of Paris has a considerable fascination) by what I may call the superficial and external aspect of the superficial and external aspect of Paris.” This was surely carrying lucidity to dazzling-point; I did my best to profit by it, but I couldn’t be sure that I was exercising

exactly the right discrimination, and in the end I surrendered to the charm of Paris without too much circumspection. This is Edward Marsh, recounting a conversation he had in his youth with (of course) Henry James. EDWARD MARSH, A NUMBER OF PEOPLE: A BOOK OF REMINISCENCES 115-16 (1939).

¹⁸³ Judge Hall, dissenting in the court of appeals, found these allegations of “unconscionability” “vaguer than most” and “thinner than most.” [Jackson v. Rent-A-Center West, Inc.](#), 581 F.3d 912, 920 (9th Cir. 2009). One suspects here the presence of the sort of reflexive boilerplate that plaintiff’s attorneys have learned to generate in the hope of avoiding a motion to compel. As indicia of “substantive unconscionability” the employee had pointed to provisions in the agreement

- which required the employee to be responsible for half of the filing fees and of the fees of the arbitrator, and for all its own costs and attorneys’ fees;
- which limited discovery by allowing the deposition of only “one individual and any expert witness designed by another party”; and
- which were “impermissibly one-sided” in that they required the employee to arbitrate claims of discrimination, while exempting from arbitration claims by the employer for injunctive relief for “unfair competition” or the disclosure of trade secrets or confidential information.

[Reht-A-Center West, Inc. v. Jackson](#), Brief for Respondent [Jackson], 2010 WL 1186482 at *2-*4. Only the first of these had actually been addressed by the district court -- which found the claim that liability for costs would be “overly burdensome” to be speculative and based only on “mere supposition,” [Jackson v. Rent-A-Center West, Inc.](#), 2007 WL 7030394 at *3 (D. Nev. June 7, 2007). The court of appeals found no error in this, [Jackson v. Rent-A-Center West, Inc.](#), *supra*, 581 F.3d at 919 (“Jackson presented no evidence suggesting prohibitive costs would *actually* be incurred and so did not meet his burden” of proof). As to the last of these, I have expressed at some length my deep skepticism as to whether any of this could ever be sufficient to warrant a finding that an agreement was unenforceable; see Rau, “Separability,” *supra* note 1, at 74-81 (“in many cases any perceived ‘one-sidedness’ will inevitably be trivial, since the drafting party is unlikely in any event to have claims to assert, in any forum, against the adhering party”; in addition, “parties enter into contracts *when the overall perceived utility of the transaction* for them exceeds any costs,” and so where “any *particular* contractual provision confers benefits (or imposes burdens) unequally,” it need not follow “that this lack of a neat symmetry amounts in itself to such ‘unfairness’ as to warrant judicial relief”) (emphasis in original).

¹⁸⁴ This claim apparently rested on the simple assertion that the employee had been “in a position of unequal bargaining power” when the arbitration agreement (which was “non-negotiable”) was “imposed as a condition of employment,” Brief for [Respondent](#), *supra* note 183, 2010 WL 1186482 at *3. But all that of course would be true by definition in just about any contract of adhesion, would it not? -- and so this factoid serves no other purpose than to put the case in a common, suspect, category. Cf. [Nagrampa v. Mailcoups, Inc.](#), 469 F.3d 1257, 1310 (9th Cir. 2006) (Kozinski, J., dissenting) (“great financial disparity” and “a form contract, the terms of which were non-negotiable,” are “*always* present where an individual signs up for a franchise, and yet franchise agreements are not per se unenforceable”); Daniel D. Barnhizer, [Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions](#), 45 WAKE FOREST L. REV. 607, 623 (2010) (in the 9th Circuit’s “unconscionability” decisions, consumers, employees and franchisees are subject to a “stereotyped analysis of relative bargaining power and oppression by established business firms”; “[o]nce the court identifies the party resisting arbitration as a member of a protected status,” further inquiry ceases; “‘Context’ becomes the new formalism”).

¹⁸⁵ In all of the cases in this “trilogy” the alignment of the Court was precisely the same (except in trivial respects -- Justice Sotomayor did not participate at all in *Stolt-Nielsen*, and Justice Kagan replaced Justice Stevens in dissent in *Concepcion*).

¹⁸⁶ James M. Gaitis, *Rent-a-Center, West, Inc. v. Jackson and the Ongoing Assault on Party Autonomy*, available at <http://www.karlbyer.com/blog/?p=9732>.

¹⁸⁷ David Horton, *Arbitration as Delegation*, available at <http://ssrn.com/abstract=1665565> (2011) at p. 129.

¹⁸⁸ Schwartz, *supra* note 37, at 25.

¹⁸⁹ [Prima Paint Corp. v. Flood & Conklin Mfg. Co.](#), 388 U.S. 395 (1967).

- ¹⁹⁰ See Rau, "Separability," supra note 1, at 29, 33-34 ("this rule of thumb in the absence of explicit articulation, this allocation of the burden of proof, is no more a 'fiction' than is our usual assumption that a seller has promised to deliver merchantable goods").
- ¹⁹¹ See *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General Int'l Ins. Co. Ltd.*, [1993] 1 Lloyd's L. Rep. 455, 469 (C.A.) ("or in other words, the inconvenience of having one issue resolved by the Court and then, contingently on the outcome of that decision, further issues decided by the arbitrator, see also *id.* at 470 ("I would be very slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings") (Hoffmann L.J)).
- ¹⁹² See Alan Scott Rau, "Separability" in the United States Supreme Court, 2006 (1) STOCKHOLM INT'L ARB. REV. 1, 3-9.
- ¹⁹³ See the detailed discussion in note 57 *supra* & note 235 *infra*.
- ¹⁹⁴ See Rau, "Separability," supra note 1, at 81 - 83.
- ¹⁹⁵ See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). This usually goes under the rubric of "the presumption of arbitrability"; see also AT&T *Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 650 (1986). On the time-honored "presumption of arbitrability" as a majoritarian default, see the discussion at note 114 *supra*.
- ¹⁹⁶ Cf. Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. DISP. RESOL. 1, 49, 65 (2011):
[U]nder *Prima Paint*, the arbitrability question may be delegated to the arbitrator as an *initial* matter, allowing the court to review the arbitrator's jurisdictional findings at the award enforcement stage By resting its decision on the separability rule of *Prima Paint*, [*Rent-A-Center*] is a case about deferring, not supplanting, judicial review of an arbitrator's jurisdictional findings.
I'm afraid I can't see this at all: To begin with, in the *Prima Paint* line of cases there is not the slightest question of delegating to the arbitrators any issue of "arbitrability" -- which, as I say above, is a matter that has already been conclusively determined by the Court. And in consequence, the arbitrator is asked to make no "jurisdictional" findings at all. And so, whatever the arbitrator *has* been authorized by the parties to decide (whether it is "fraud," or the "illegality" or "unconscionability" of the overall contract), is not subject to any unusual or expanded review that would be any different at all from review of his decision concerning the quality of delivered widgets -- nothing is "deferred." Of course this familiar truncated deferential standard of review will always allow scrutiny of awards for violations of due process or "public policy" -- but this inevitable safety valve is applicable in precisely the same degree to any widget award. Cf. *id.* at 47; cf. Rau, *supra* note 51, at 501-02 ("since externalities -- negative social effects -- necessarily limit every exercise of contractual autonomy, vacatur for violation of 'public policy' is a necessary fail safe, universally understood in every existing legal system as a ground (whether 'statutory' or 'non statutory') for refusing to honor an award").
- ¹⁹⁷ "[A] court may order arbitration of a particular dispute only when satisfied that the parties agreed to arbitrate that dispute"; "[t]o satisfy itself that such agreement exists, the court must resolve any issue that calls into question the specific arbitration clause that a party seeks to have the court enforce," including issues concerning "the scope and enforceability of the parties' arbitration clause" and "whether the clause was agreed to." *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 130 S. Ct. 2847, 2856 (2010) (Thomas, J.).
In this collective bargaining case, Justice Thomas seemed freely to conflate (on the one hand) disputes that go to the original "making" or "formation" of the arbitration agreement, and (on the other) disputes that go to its "validity" or "enforceability." And that would be quite proper -- since any distinction along those lines would be perfectly pointless: What is at stake in *all* cases is whether there is any *continuing contractual obligation on the part of one party that constrains him to submit to arbitration*. (I would assume for example that "formation" may be incontestable, and an arbitration agreement may be "properly made" -- but that it may later become unenforceable "as an agreement," through frustration or rescission or termination or cancellation or abandonment. See Rau, "Separability," supra note 1, at 24 n.58 ("the teaching of *Prima Paint* is that it must always be a task for the court to pass on the continued existence of the arbitration clause itself").) In a case arising under the FAA a court, in the absence of any such contractual obligation, has no business compelling arbitration under § 4 -- and to the extent there remains any prospect of a post-award challenge under § 10, the initial decision to force parties into a process that may predictably prove futile, would seem particularly ill-advised.
So such a distinction would be non-functional, and what is worse -- like all purely verbal tests -- ultimately incoherent and without predictive value; compare *Concepcion*, 131 S. Ct. at 1753, 1755 (Thomas, J., concurring)(while § 4 requires that a resisting party

must challenge the “formation” or the “making” of the arbitration agreement exclusively, “unconscionability,” like fraud and duress, all “historically concern the making of an agreement”), with Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2060 (2011) (“unconscionability does not really go to the issue of whether a contract was made” for purposes of § 4 but instead goes to “what the arbitration agreement is made of”).

¹⁹⁸ See Rau, “Arbitrability,” supra note 11, at 291 (“there would otherwise be an obvious danger of bootstrapping: If the arbitrators are arguably mere interlopers, there is certainly no foundation for any deference to whatever views they may have on the subject”).

¹⁹⁹ See, e.g., *Hearthshire Braeswood Plaza Ltd. Partnership, SMP v. Bill Kelly Co.*, 849 S.W.2d 380, 388-89 (Tex. App. 1993) (contractor alleged it had been fraudulently induced to enter into the arbitration agreement because the property owner had represented that all disputes between the parties were to be resolved by the project manager; held, though, that there was “no evidence” to support a finding of fraud in the inducement of the arbitration provision, lacking any claim that the owner “knew the statement was false when it was made” or that he then “had no present intent to perform”).

²⁰⁰ Rau, “Separability,” supra note 1, at 67.

²⁰¹ E.g., *Murray v. United Food & Commercial Workers Int’l Union*, 289 F.3d 297, (4th Cir. 2002) (“A single arbitrator shall be chosen by the alternate strike method from a list of arbitrators provided by the President’s office [of the employer]”; held, “we again refuse to enforce an agreement so utterly lacking in the rudiments of even-handedness”).

²⁰² E.g., *Nagrampa*, 469 F.3d at 1285-90 (an “unduly oppressive” venue -- which would “require a one-woman franchisee who operates from her home to fly across the country [to Boston] to arbitrate a contract signed and performed in California” -- was “so prohibitively costly to [her] that she was precluded from participating in the proceeding”); *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 108 (Mo. App. 2003) (“the selection of Arkansas as the venue for arbitration is unexpected and unconscionably unfair” as to “an average consumer purchasing a car in Missouri”); *Walters v. AAA Waterproofing, Inc.*, 211 P.3d 454, (Wash. App. 2009) (plaintiff, a Washington resident, “has established that for him, the cost of participating in an arbitration conducted in Denver is prohibitive”; he and his wife both work “as state correctional officers with a combined net income of \$2,150 every two weeks,” and he “plausibly declares that they have nothing left from their paychecks after paying [necessary living] expenses”; although the plaintiff “has numerous family members who live near Denver” and the defendant suggests that he “could arrange to stay with them, thereby eliminating any cost for room and board,” “we decline to presume the charity of family”).

²⁰³ E.g., *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88 (Cal. App. 2004) (“given the complexity of employment disputes ... it will be the unusual instance where the deposition of two witnesses will be sufficient to present a case”); *Openshaw v. FedEx Ground Package System*, 731 F. Supp. 2d 987, 995 (C.D. Cal. 2010) (defendant’s “discovery provision” was apparently interpreted so as to bar the plaintiff from even “requesting documents related to [his] termination”; “a contractor’s capacity to vindicate [his] claim of wrongful termination will be severely constricted” “without any understanding as to why [he was] terminated”).

²⁰⁴ See generally the discussion in Rau, “Separability,” supra note 1, at 68-70 (“substantial filing fees may affect the claimant’s very access to the arbitral forum -- at least to the extent that such fees are not advanced by the attorney-entrepreneur”; “on the other hand, where the costs will abide the result, the matter seems quite different”); cf. Christopher Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 735 (2006) (“the contingent fee mechanism provides a means for overcoming liquidity and risk aversion barriers to arbitration,” and as a result “it does not follow that arbitration costs necessarily preclude individuals from bringing their claims in arbitration”).

²⁰⁵ On this terminology, see the discussion in note 53 *supra*.
For the application here see *Rent-A-Center, West, Inc.*, 130 S. Ct. at 2782 (Stevens, J., dissenting) (“In this case we are concerned” with “whether the parties have a valid arbitration agreement,” a “question of arbitrability” that “the FAA assigns to the courts”); cf. *id.* at 2777 (Scalia, J. for the Court) (“the question before us” is whether the parties’ “agreement to arbitrate a gateway issue” is “valid under § 2”).

²⁰⁶ *Rent-A-Center, West, Inc. v. Jackson*, Oral Argument, 2010 WL 1654083 at *38 (Justice Breyer).

²⁰⁷ Rau, "Arbitrability," *supra* note 11, at 294-95 (emphasis in original).

²⁰⁸ [*First Options of Chicago, Inc.*, 514 U.S. at 943](#) (emphasis in original).

²⁰⁹ Rule 7(a) of the AAA's Commercial Arbitration Rules provides:
The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
This rule was expressly "designed to address" the Court's suggestion in *First Options* and constitutes party agreement to the arbitrability of "jurisdictional disputes," *see* American Arbitration Association Commercial Arbitration Rules Revision Committee, *Commentary on the Revisions to the Commercial Arbitration Rules of the AAA*, ADR CURRENTS, Dec. 1998, at 6, 7.

²¹⁰ *See, e.g., Terminix Int'l Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1331 (11th Cir. 2005) (by incorporating the AAA rules, the parties "clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid"; "the parties have contracted around [the usual] default rule"); [*Way Services, Inc. v. Adecco North America, LLC*, 2007 WL 1775393 at *5 \(E.D. Pa.\)](#) (incorporation of the AAA rules is evidence of an "agreement to arbitrate all disputes as to arbitrability, including the proper scope of the arbitration").
I am aware of course that the current draft of the Restatement takes a different position, *see* RESTATEMENT OF THE LAW THIRD, THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION, § 4-14 Reporters' Notes note e. (Preliminary Draft No. 5, Sept. 1, 2011) (although "institutional arbitration rules" give arbitrators "the authority to rule on issues of scope, they do not expressly provide that the arbitrators have the final and unreviewable authority to determine" such issues; "instead the language must ... indicate that the arbitrators' determination is final and entitled to deference by the courts"); *see also* § 4-12 cmt. d. (same apparently with respect to the existence or invalidity of the arbitration agreement). But I find this somewhat puzzling: Just what should we suppose to have been the *point* of the AAA's revision of its rules, after all? Surely there was, at the time, no felt pressing need to act merely in order to codify the so-called "positive effect" of the doctrine of *compétence/compétence*? *Cf.* Rau, *supra* note 152, at 121 n.190 (for it could never have been "asserted with a straight face that arbitrators are somehow obligated to pack up their papers and turn out the lights, as soon as one of the putative parties sends them a note objecting to their jurisdiction"). Or is the problem that the intentions of the AAA drafting committee should not automatically be imputed to contracting parties who may have adopted the rules without fully grasping the legislative history?
My guess is rather that the Restatement position, while not in accord with most U.S. cases, may be understood as an attempt to bridge -- by fiat if necessary -- the wide gap between the understandings of U.S. and of foreign practice. Other sets of institutional rules, like those of the ICC, similarly provide that in case of dispute over the "existence, validity or scope" of the arbitration agreement, "any question of jurisdiction ... shall be decided directly by the arbitral tribunal." *E.g.*, ICC RULES OF ARBITRATION, Art. 6(3). But in such cases it seems clear that the provision was meant only to restate party agreement to the arbitrators' *competence/competence* -- at most a matter of chronological priority -- and thus not intended in any way to amount to consent to a final allocation of decision-making authority. *See* YVES DERAIS & ERIC SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 80 n.131 (1998) ("Ultimately, the Arbitral Tribunal's determination will usually be the subject of judicial control once the tribunal has rendered its Award"). The *arbitrali* of other states -- precisely because they lack the *First Options* backstory -- are likely to find the possibility of a definitive re-allocation of authority "exorbitant," and to insist that before arbitrators can be given the last word, the expression of party intention must be particularly "explicit." *See, e.g.*, PHILIPPE FOUCHARD ET AL., TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL 410 (1996); Pierre Mayer, *L'Autonomie de l'arbitre international dans l'appréciation de sa propre compétence*, [1989] 5 REC. DES COURS 319, 340-41 ("and we practically never come across it"). Their experience, however, is not ours.
So we are very far indeed from France, *cf.* Cross, *supra* note 196, at 6. Admittedly though, our growing willingness to deem the arbitrators themselves empowered to make final decisions with respect to their own jurisdiction "may, paradoxically, be moving us in the direction of achieving some of [the] same goals [sought to be advanced by French legislation, although] without the accompanying risk that the proceedings may ultimately turn out to be futile." Rau, *supra* note 152, at 127 n.202.

²¹¹ *Cf.* Rau, "Consent," *supra* note 53, at 90-91 (in such cases, "it is hard to imagine how the parties could have done much less").

²¹² [*Jackson*, *supra* note 183, 2007 WL 7030394 at *1.](#)

²¹³ [*Rent-A-Center, West, Inc.*, 130 S.Ct. at 2777.](#)

²¹⁴ See TOM CARBONNEAU, CASES AND MATERIALS ON COMMERCIAL ARBITRATION 172 (1997); more recently, see Nicholas R. Weiskopf, *Unnecessary Decision Making: A U.S. View of the Supreme Court's 2010 Arbitration Cases*, DISP. RES. J., Feb.-April 2011 at 33, 43 (§§ 2, 3, and 4 of the FAA “assign underlying determinations to the court” and “are not default rules”; “any permitted delegation to the arbitrator of an arbitrability issue ... ‘fights’ the statute”); David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 VA. L. REV. *In Brief* (April 2, 2010), <http://www.virginialawreview.org/inbrief/2010/04/02/horton.pdf> 3 (§ 4 confers a “judicial monopoly,” so that courts have “the exclusive right to decide whether all or part of an arbitration clause is valid,” and parties “cannot arbitrate the issue of whether the arbitration clause is unconscionable”). But there are no legal impossibilities anywhere in the law, and, as the following note suggests, the parties “can” arbitrate whatever they choose.

²¹⁵ See Rau, “Arbitrability,” *supra* note 11, at 295, with respect to the *First Options* case itself: [Suppose that] Mr. Kaplan has told the putative “arbitrators” that while he really does not believe that he is bound to arbitrate, he recognizes that this remains a complex legal question: So, in order to avoid duplicative and costly litigation -- and after lengthy discussions with his counsel -- he thinks it best to entrust this issue to the panel for a final judgment, being willing to abide whatever the result may be.

Could it possibly be thought that in these circumstances, a reviewing court would be within its rights to ignore this “delegation” from Kaplan, paying no attention at all to an arbitral award to the effect that he is both bound to arbitrate and liable? Sure, a court must be “satisfied” that there has at some point been an agreement to arbitrate: But how much in thrall to the “plain meaning” fallacy does one have to be, in order to deny that a court might be appropriately “satisfied,” not directly, *but at an earlier stage and at one remove* -- that is, after it has identified an agreement by which the parties were willing to entrust this determination to their agent? Can any conceivable purpose explain such a wooden result? I have yet to see one. (Yelling is not after all synonymous with argument.) Surely statutory language must have a “meaning consistent with the policy behind it,” and “the thought behind the phrase proclaims itself misread when the outcome of the reading is injustice or absurdity,” [Surace v. Danna, 161 N.E. 315, 316 \(N.Y. 1928\)](#) (Cardozo, J.).

It will probably be noticed that I tend to quote myself a lot -- but then, somebody has to. If you prefer, Justice Kennedy made essentially the same point during oral argument in [Rent-A-Center: See Oral Argument, supra note 206, 2010 WL 1654083 at *36](#) (“after this suit was filed and both parties are going up the steps to the court, could the attorneys and the parties stop and say, let’s arbitrate this issue of unconscionability, and pick an arbitrator? ... You see, if you say yes ... then the question is why can’t they do it when the contract’s signed?”).

²¹⁶ But cf. Tom Carbonneau, *A Comment Upon Professor Park’s Analysis of the Dicta in First Options v. Kaplan*, 11(11) INT’L ARB. REP. 17, 18, 22 (1996) (where “a would-be agreement to arbitrate” provides that all disputes, including questions of arbitrability, are to be submitted to arbitration, then the “[*First Options*] doctrine clearly allows arbitrators to rule on the validity and scope of the arbitration agreement” “in nearly final fashion” -- *despite the allegation by one party that the “arbitration agreement was obtained under duress” and is thus not “valid as a contractual instrument”*) (emphasis added). More recently, see Cross, *supra* note 196, at 61 (suppose a “borrower signs a standard form loan agreement containing an arbitration clause that provides for arbitration by a sole arbitrator of the lender’s choosing,” and which also contains a “delegation clause”; “the implication of the *First Options* dictum is that any findings by the arbitrator as to whether the arbitration agreement is unconscionable must be accorded deference at the award enforcement stage”).

²¹⁷ Rau, “Separability,” *supra* note 1, at 5.

²¹⁸ [Granite Rock Co., 130 S. Ct. at 2855-56](#) (emphasis added).

²¹⁹ See Cross, *supra* note 196, at 59-60 (*Granite Rock* “suggests that the Court may not enforce a delegation clause that purports to vest in the arbitrator exclusive authority to determine whether an arbitration agreement has been *formed* (as opposed to determining whether the contract is *enforceable*)”; “a delegation clause that purports to vest in the arbitrator exclusive authority to determine a contract’s formation would be invalid”) (emphasis in original); see also Stipanowich, *supra* note 129, at 369 (*Granite Rock* “appears to be conceptually separating questions of bare, formal assent, which are inescapably for the courts, from questions about the enforceability or validity of the arbitration agreement, which may be delegated to arbitrators”).

²²⁰ See the discussion in note 197 *supra*; see also Rau, *supra* note 192, at 18:

Ingenious riffs on this metaphysical distinction between contract “invalidity” and contract “nonexistence” have long been a staple of Continental legal learning, [but this] tendency to take metaphor for reality ... exemplifies the worst excesses of formalism. It was the British philosopher F.C.S. Schiller, I am told, who once said that nothing had a greater hold over the human mind than nonsense fortified by technicality ... [T]he whole notion of “nonexistence” is not only sterile and purely verbal -- but what is worse, is completely unnecessary.

A simple demonstration: A “contract” entered into by a minor has, I think, been “formed” and does, I think “exist” -- at least judging from the fact that it can be enforced *by* him, or even enforced *against* him if not disaffirmed in a timely manner; conversely, challenges based on indefiniteness or mutual mistake may well call into question whether any contract at all has ever “come into being.” Yet nevertheless, in the latter case the parties might plausibly have chosen to have such issues resolved in arbitration -- and so I believe a claim that an enforceable agreement “was never concluded” will not prevent “the inference that the parties would have wanted to entrust that very determination to arbitrators chosen by them,” Rau, *supra* note 152, at 164 n.297. But can’t we agree that in the former case -- despite “formation” -- such an arbitral grant of power would be unthinkable?

Still, for an illustration of how this “validity/nonexistence” distinction can lead to toxic misunderstanding even on the part of otherwise rational individuals, see *In re Morgan Stanley & Co., Inc.*, 293 S.W.3d 182, 193 (Tex. 2009) (Hecht, J., dissenting) (“an agreement with a person lacking [mental] capacity exists -- it happened”; since “the rule in Texas and most other jurisdictions is that the contract exists and can be ratified or avoided,” this is therefore a different issue from “issues of signature or authorization,” and the question of mental capacity must be “for the arbitrator rather than the judge”).

²²¹ Cf. Steven J. Ware, *Arbitration Law’s Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 123-24 (2007). In the direct context of *Prima Paint*, Professor Ware writes that “the individual who signs with a gun to her head *does agree* to arbitration, she *does manifest assent* to the terms on the document she is signing” -- and so the inevitable, if unfortunate, result is that *Prima Paint* would require the question to be sent to the arbitrator and not the court; “consistency requires Professor Rau to ... change sides on either *Prima Paint* or the gunpoint example.” I fear this rather misses the mark. The point -- unless we are dealing with a particularly eccentric or playful thug indeed -- is that a signature at gunpoint *can only mean that the arbitration clause too was induced by coercion*: There is simply no way around that conclusion as a simple universally acceptable commonsensical homely description of the fact pattern we are presented with.

But by contrast: Why would a lie, say, about a consulting business (as in *Prima Paint* itself) be pertinent -- transposable -- to the arbitration agreement? Only through an *a priori* -- and highly dysfunctional -- doctrinal presumption that insists for some reason that all clauses in the document *must* be similarly tainted. See also the discussion at notes 227, 264, & 281 *infra*.

²²² See, e.g., *Bank of America, N.A. v. Diamond State Ins. Co.*, 38 Fed. Appx. 687, 688, 689 (2d Cir. 2002) (defendant denied that its agents “had either actual or apparent authority to bind [it] under the reinsurance contracts”; “while the arbitration provisions state that issues concerning the ‘formation and validity’ of the contracts ‘shall be submitted to arbitration,’ it is not clear that this includes the question of the *very existence of the contract*”; (emphasis in original) motion to compel arbitration denied); see generally Rau, “Separability,” *supra* note 1, at 5-7, 30-31; Rau, “Consent,” *supra* note 53, at 77-78.

²²³ See William W. Park, *The Arbitrator’s Jurisdiction to Determine Jurisdiction*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?, ICCA CONGRESS SERIES NO. 13 at 55, 130 (Albert Jan van den Berg ed., 2007).

²²⁴ But see Steven H. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*, 20 AM. REV. INT’L ARB. 159, 167, 181 (2009) (to ask if the issue, whether there “exists any binding arbitration agreement,” is one that “the parties agreed is to be submitted to arbitration,” is “logically impossible”; “where the validity of the arbitration contract itself is challenged, such contract cannot serve as the basis for giving any power to the arbitrator”); Samuel, *supra* note 61, at 38-39 (*Rent-A-Center* is “illogical nonsense because if the arbitrator were to find the agreement to arbitrate unconscionable and unenforceable,” the delegation provision “too would be unconscionable and unenforceable”); Schwartz, *supra* note 37, at 25-26 (there is a “conceptual problem” and a “logical impossibility” here in that “if an arbitration agreement is unconscionable, then the victim of the unconscionable contract never really agreed to arbitration at all”).

All of this is eerily reminiscent of the frequent failure to appreciate the thrust of *Prima Paint* itself -- regularly leading to the conclusion that the whole notion of “separability” is “dubious” nonsense: For, it may be asserted, if the overall container contract is unenforceable on grounds, say, of fraud, then doesn’t this too necessarily destroy any jurisdiction that the arbitrator might have to decide the question? Both such critiques tend to focus on conceptual and formulaic notions of contract “validity” rather than on the only interesting question -- which is the likely boundaries of contractual assent. To criticize *Prima Paint* on the ground that “a party that procures a contract by fraud” should not “get any benefit of its bargain,” Schwartz, *supra* note 37, at 26, completely misses the point -- which is obviously that *the proper decision-maker to determine the very question whether there has even been fraud, has yet to be identified*.

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Cf. note 216 *supra*.

As should be obvious, I am profoundly indifferent as to whether the challenge here would be thought to go to the “making” or the “existence” or the “validity” or the “enforceability” of the agreement.

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The previous footnote is equally applicable here.

Professor Schwartz writes that the *Rent-A-Center* majority could not be “so stupid as to believe that [its] analysis makes any sense”: “There will never be occasion to challenge a delegation clause without challenging the overall arbitration clause,” since “the delegation clause only comes into play when there is a challenge to arbitration.” Schwartz, *supra* note 37, at 26. Certainly it would seem meaningless to challenge a “delegation” clause when the validity of the arbitration agreement generally is conceded -- but that’s hardly an interesting question, is it? What by contrast *is* interesting, is the converse: Is it possible to challenge the arbitration clause generally *without calling into question a separate agreement to “delegate”* this issue to the arbitrator himself? And as I explain in the text, the answer is “yes.”

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Both cases, that is, require putative agreements to be tested against the proviso of § 2.

When I say that we must, in spinning out a law of arbitration, privilege above all -- as the primary organizing principle -- the will of the contracting parties, I hope I am not taken to suggest in the slightest that the black-letter lore of Langdell and Williston and the First Restatement should continue to constrain us. For Contract evolves; Contract is merely an heuristic (or more properly perhaps, a manner of approaching and understanding and organizing the world); Contract is responsive to social policy; above all Contract is concrete and intensely context-dependent and context-sensitive (or at least, in less formalistic versions, it aspires to be). So, for example, I guess it may be true that hornbook Contract law for the last century has treated misrepresentation as “a defense that (if proven) makes *all* the terms of the contract unenforceable,” *see* Ware, *supra* note 221, at 128; *see also* Horton, *supra* note 187, at 149 (“black letter contract principles” would not bind a party to a promise to arbitrate if “a defense to enforcement applied to the container contract”); Richard L. Barnes, [Prima Paint Pushed Compulsory Arbitration under the Erie Train](#), 2 BROOK. J. CORP. FIN. & COM. L. 1, 2 (2007) (“classical contract doctrines” “require an examination of the entire contract to properly judge the enforceability of the compulsory arbitration clause, which the common law would view as just another contract provision”; conflict with arbitration policy “can be reduced by proper federal deference to state common law”). But I’m not at all sure why any of that should particularly matter to us. One difference that we cannot lose sight of is fairly obvious: An arbitration clause -- *alone* -- poses the general question of *who the appropriate decision-maker* on this question is to be -- that is, more precisely, *to whose decision* the parties have wished to submit themselves?

For this reason, inherent in the notion of “separability” is that “the required existence of a valid, enforceable assent to arbitration must be appreciated independently” -- or more precisely, that “the agreement to arbitrate must be assessed without regard to any supposed contract-law doctrine under which the arbitration clause is necessarily ‘tainted,’ or ‘infected,’ or ‘voided,’ or ‘invalidated,’ or ‘nullified,’ merely by defects in the overall contract.” *See* Rau, *supra* note 192, at 30. Of course a default rule to the contrary is theoretically conceivable -- but since it can’t be asserted *ex cathedra*, it really requires some justification. For it would be “just as facile to assume *a priori* that defects in the main agreement *must* vitiate the arbitration clause, as to assume that they *cannot*.” Rau, “Separability,” *supra* note 1, at 27 (emphasis in original).

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See Rau, “Separability,” *supra* note 1, at 4 (“Under any sensible reading of *Prima Paint*, a person is only bound to arbitrate a dispute if he has agreed to do so”).

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Rau, *Culture*, *supra* note 50, at 451; *see also* Alan Scott Rau & Catherine Pédamon, *La contractualisation de l'arbitrage: le modèle américain*, 2001 REV. ARB. 451.

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See, e.g., Sebastian Perry, *Arbitration in the EU a “Nightmare”?*, 5(4) GLOBAL ARB. REV. 32 (July 9, 2010)(comments of Professor Mistelis; “the average educated American lawyer sees arbitration as nothing more than an extension of contract law, without getting into a discussion of the fact that arbitration is effectively a jurisdictional agreement”; “the U.S. has no developed concept of international arbitration and I’m afraid it will never acquire it”); William W. Park, [Arbitrator Integrity: The Transient and the Permanent](#), 46 SAN DIEGO L. REV. 629, 641 (2009) (“ethical questions [should not] resolve themselves into issues of contract interpretation”; “*tout ce qui est excessif devient insignifiant*”).

But the problem with all of this, familiar to Archimedes, is that we really have to know just where we are standing. *Either* we start with the primacy of party expectations, to which we are willing to defer -- *or* we have to spin out a coherent rationale for interference with private autonomy. Here the conduct we expect of public tribunals has little purchase. That arbitral decisions may affect the general respect for the “sanctity of contract” -- or that they may have an impact on the price that the public ultimately has to pay for drugs or for the cost of heating in winter -- seems clear enough; *cf. id.* at 673 & n.150. But then, so to precisely the same degree do the decisions of corporate directors and purchasing agents and litigators. These are all cognate cases, and where

externalities can in fact be identified the same case for public intervention into private choice has to be made.

²³¹ Cf. *Rent-A-Center, West, Inc.*, 130 S. Ct. at 2787 (Stevens, J., dissenting) (“because we are dealing in this case with a challenge to an independently executed arbitration agreement ... any challenge to the contract itself is also, necessarily, a challenge to the arbitration agreement. They are one and the same.”).

²³² Cf. *id.* at 2784-85 (“gross inequality of bargaining power” may suggest that the weaker party “did not in fact assent or appear to assent to the unfair terms,” and thus may prevent any “meaningful agreement”; “if the terms of the agreement are so one-sided -- and the process of its making so unfair -- it would contravene the existence of clear and unmistakable assent to arbitrate the very question petitioner now seeks to arbitrate”). But for the possible legitimacy of an agreement envisaging an arbitrator who is “so closely allied with one of the parties as to be presumed partial to him,” see Alan Scott Rau, *On Integrity in Private Judging* [hereinafter Rau, *Integrity*], 14 ARB. INT’L 115, 122-35 (1998).

²³³ Cf. *Jackson*, 581 F.3d at 917 (the “Employer urges us to consider only that Jackson signed the Agreement, which contains language consigning the arbitrability question to the arbitrator”).

²³⁴ See note 219 *supra*.

²³⁵ E.g., on the permissible exclusion of statutory remedies, see note 57 *supra*; see also Rau, “Consent,” *supra* note 53, at 143-44 (“defects in the parties’ agreement -- any impermissible restriction of statutory rights -- need not impair the validity of the submission to private adjudicators”; “if the process is not itself tainted, such defects say absolutely nothing about the unsuitability of the particular arbitral scheme”; “this is precisely what the notion of ‘separability’ is all about”).

Professor Bruhl claims to have identified a “nascent trend toward a federal rule shifting more authority over such challenges to the arbitrator” -- and pointedly asks the very same question I’ve been asking myself for a long time: “If the law in fact says that these challenges are for the arbitrator, why has it taken most people so long to start catching on?” Bruhl, *supra* note 180, at 1473-74 (perhaps “because there was no pressure to shift the locus of decision-making until some courts started using unconscionability opportunistically”).

See, e.g., *Bondy’s Ford, Inc. v. Sterling Truck Corp.*, 147 F. Supp. 2d 1283, 1292 (M.D. Ala. 2001) (to the extent that one party claims that a waiver of punitive damages renders the contract void because it is “unconscionable,” “the validity or invalidity of these provisions may be argued to the arbitral tribunal, and do not clearly implicate the arbitration clause itself”); *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, 898 So.2d 86, 88 (Fla. App. 2005) (“the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are in the scope of the arbitration agreement,” and so “whether an arbitration provision is unenforceable because it limits statutory remedies is for the arbitrator, not the trial court”).

²³⁶ See text accompanying notes 201-05 *supra*.

Note, however: The fact that a contractual provision imposes substantive limits on available recovery -- even to the point that it may no longer be cost-effective to arbitrate (or litigate) the claim -- does not thereby magically transform the case into one where arbitration costs are “excessive” or “unconscionable.” For the problem there is the amount in controversy, not the unfairness of the forum. But cf. *McDonough v. Thompson*, 2004 WL 2847818 (Ohio App. Dec. 9, 2004). Here homeowners sued a home inspection service for negligence, asking more than \$25,000 in damages. The agreement limited the inspector’s liability “to a refund of the fee paid,” which was \$169; since the arbitral forum required a filing fee of \$650, the trial court found the arbitration clause “unconscionable” and denied a motion to compel arbitration. This was affirmed: “It is unreasonable to expect the [plaintiffs] to pay \$650 in arbitration fees when they can recover only \$169,” and so “the arbitration provision operates to deter a claimant from pursuing any claim under the contract.” *McDonough v. Thompson*, 2004 WL 2847818 at * 4. But if the plaintiffs’ maximum recovery is set by contract at \$169, then presumably any arbitration -- whatever the filing fee, and whatever their circumstances -- is likely to be prohibitively expensive; on the other hand, if the substantive limit on liability is somehow “unconscionable,” then the case may become economical to pursue -- but that would not be a question for the court. Compare the discussion at note 235 *supra*.

²³⁷ See *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-92 (2000) (a mere “risk” would be “too speculative to justify the invalidation of an arbitration agreement”).

I see no need for the purposes of this discussion to draw any distinction between the supposed “unconscionability” that might be thought to unduly burden a common-law claim, and remedial restrictions that might be thought to impair a public interest in the

“vindication” of statutory rights: That is largely an empty vessel anyway, but at the very least doesn’t seem to affect the allocation of decision-making authority. *See* Rau, “Separability,” *supra* note 1, at 60-61; *cf.* [Kristian v. Comcast Corp.](#), 446 F.3d 25, 60 n. 22, 63 (1st Cir. 2006) (“the unconscionability analysis always includes an element that is the essence of the vindication of statutory rights analysis -- the frustration of the right to pursue claims granted by statute,” and “many of Plaintiffs’ unconscionability arguments are merely reiterations of their vindication of statutory rights arguments”). In any event, as we remember, both the district court and the court of appeals in *Rent-A-Center* were in agreement that the plaintiff had failed to carry this burden; *see* note 183 *supra*.

²³⁸ [Awuah v. Coverall North America, Inc.](#), 554 F.3d 7, 11-12 (1st Cir. 2009) (emphasis added). Here the court began by finding that R. 7(a) of the AAA rules was effective in committing to the arbitrator the question of the validity of the agreement to arbitrate; *see* text accompanying notes 208-09 *supra*. This is the “delegation” clause. But the plaintiffs/franchisees had nevertheless claimed that the probable costs of arbitration would be “overwhelming” so that “in practical effect they have no real opportunity to get issues, including unconscionability, resolved in arbitration.” (emphasis added) The court dealt with the matter by making an explicit distinction along the lines of the argument suggested in the text:

Our concern here is not with unconscionability -- essentially a fairness issue -- but more narrowly with whether the arbitration regime here is structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses. (emphasis in original) [Id.](#) at 13.

So the case was remanded to the district court for a ruling on the narrow issue “as to whether the arbitration remedy ... is illusory” in that sense. *Id.*

²³⁹ Professor Horton gives a similar case; *see* Horton, *supra* note 187, at 130 n.181 (courts would then be able to “focus on only how onerous it would be for the plaintiff to arbitrate whether the arbitration clause is valid, not how onerous it would be for the plaintiff to arbitrate substantive claims”). But he appears to regard the possibility of such a “double-decker arbitration clause” as something of a *reductio ad absurdum*, and that’s where I fear we part company. *Id.*

²⁴⁰ [Rent-A-Center, West, Inc.](#), 130 S. Ct. at 2780.

²⁴¹ In this it seems considerably preferable to the bluff dismissal of any of these questions by Justice Stevens in dissent, who -- in this quite the captive of metaphor -- merely asserted that the cost-splitting and discovery limitations “permeate” the agreement to arbitrate. [Id.](#) at 2787 n.9 (Stevens, J., dissenting).

²⁴² *See* text accompanying note 193 *supra*, and notes 57, 235 *supra*.

²⁴³ *Cf.* Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857, 922 & n.375. Professor Harding writes that “a defense to arbitration based on public policy stemming ... from the unsuitability of the particular arbitral scheme crafted for determining the claim [challenges] the validity of the arbitration agreement”; “the claim that an arbitration clause is invalid because it improperly restricts statutory remedies should be distinguished from the situation where the parties in the container contract exclude certain types of damages.” This last phrase could hardly be more opaque: Surely the “argument” cannot depend upon the fortuities of the drafting process, distinguishing between an offending provision physically located within the arbitration clause itself and one that happens to be found elsewhere in the document?

In any event Professor Harding’s conclusion is that “the court, and not the arbitrator should determine whether a restrictive arbitration clause is valid, unless, of course, the parties to the agreement have otherwise agreed that the arbitrator should make such determination.” [Id.](#) at 921 (emphasis added).

²⁴⁴ *See* [Discover Bank v. Superior Court](#), 113 P.3d 1100 (Cal. 2005); *see also* text accompanying notes 296 ff. *infra*.

²⁴⁵ *AT&T Mobility LLC v. Concepcion*, *supra* note 4, and *infra*.

²⁴⁶ The arbitration scheme at issue in *Concepcion* included this unusual but perversely clever provision: Should a dispute go to arbitration and the customer receive an award greater than the company’s final settlement offer, the company would be required to pay a minimum recovery of \$7500 (then the upper jurisdictional limit of the state’s small claims courts), plus twice the amount of

the claimant's attorneys' fees. What this means in practice is that should it ever be faced with a claim -- likely to be of trivial face value -- the company's self-interest would predictably lead it to offer full payment immediately, in the interest of avoiding the \$7500 penalty. "If [AT&T] resolves its customer's claims through prompt payment, and does so for fear of being subjected to its contract-based \$7,500 premium, the premium has served a noble purpose, even if no customer ever actually receives it." The state courts nevertheless found the arbitration waiver "unconscionable" on the ground that AT&T's program would still not adequately address the "overarching policy concern of deterring corporate wrongdoing": Even if aggrieved consumers who went to the trouble of making a claim would be assured relief, the elimination of the class-action mechanism "would permit the defendant to retain the benefits of its wrongful conduct and to continue that conduct with impunity." [Laster v. T-Mobile USA, Inc., 2008 WL 5216255 at *12 \(S.D. Cal. Aug. 11, 2008\)](#), *aff'd sub nom. Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).

AT&T naturally argued that this state-law jurisprudence demonstrated an unusual and arbitration-hostile form of the "unconscionability" doctrine, justifying a challenge under § 2: "Because [AT&T's] arbitration provision undeniably is fair to the Concepcions, the finding of 'unconscionability' rests entirely on concern for the rights of persons *other than* the parties to the agreement before the court: the third parties who would be included within a hypothetical class action. That standard finds no support in California's generally applicable unconscionability principles," and is "a new rule, not a mere refinement of traditional unconscionability analysis." [AT&T Mobility LLC v. Concepcion, Brief for Petitioner \[AT&T\], 2010 WL 3017755, at **19, 34-36](#) (emphasis in original); *see also* Oral Argument, [2010 WL 4472577 at *12](#) ("In every other case ... the question is: Is it fair to the person before the court to apply the contract to them? Here, the district court found it was quite fair to apply to that person; the problem was third parties").

Where by contrast it is the *arbitrator's* striking of a waiver clause for "unconscionability" that is challenged under § 10, the context is obviously quite different: But could the same argument possibly be seized on and massaged here? Is it plausible to claim that the award -- by taking into account, not just the interests of the parties who had hired him, but also the interests of non-parties, or of the world at large -- amounted to "faithlessness" in the exercise of his contractual mandate? On this notion as the vital center of any challenge for "excess of power," *see* text accompanying notes 130-32 *supra*. I am unconvinced that this argument should have much purchase: For one thing, any distinction between effects on the plaintiff, and effects on third parties, seemed to play no role whatever in the ultimate rationale of the Court in *Concepcion*: It was California's blanket "*Discover Bank* rule" that was "preempted," and the Court had little choice but to write so sweepingly given that it was in no position to make nuanced judgments, historical or normative, as to the content of the state law of "unconscionability." (The few throwaway sentences at the very end of the opinion that refer to this feature of the company's plan, serve merely to reassure the reader that the Court's decision will not result in actual hardship to the consumer, *see AT&T Mobility LLC*, 131 S.Ct. at 1753.) More fundamentally, no sane arbitrator -- particularly after *Stolt-Nielsen* -- would write an opinion in which he distinguishes between the "unconscionability" effect on contracting parties, and the social effect on "third parties."

²⁴⁷ [AT&T Mobility LLC](#), 131 S.Ct. at 1749-50 & n.6; *cf. Mastrobuono*, 514 U.S. at 53-54 ("the central purpose" of the FAA).

²⁴⁸ Rau, "Arbitrability," *supra* note 11, at 296, 344.

²⁴⁹ *Id.* at 300; *see also id.* at 302 ("merely showing up should be probative of absolutely nothing"; "to understand where the dictum fairly came from is thus to understand its limited reach").

Professor Cunningham writes that any insistence on "clear and unmistakable" evidence is "a standard alien to contract law," "not used in law generally," and "of such limited use in law generally as to bewilder rather than enlighten." Cunningham, *supra* note 114, at 16 & n.104. Perhaps: But there seems to be nothing particularly "alien" in the notion that burdens of proof can be adjusted in order to handicap contentions that happen to be either unlikely or disfavored. So, for example, courts will look closely at provisions that purport to relieve one party from liability for negligence, and before enforcing them may require some "specific and conspicuous reference to negligence," [RESTATEMENT, SECOND, CONTRACTS § 195](#) cmt. b. Such a "requirement of clarity" is commonly deployed for reasons of policy that are not hard to find, and there is nothing in the "common law of contracts" or "general contract law" or "the exquisitely apolitical body of contract law" (*cf.* Cunningham, *supra* at 13, 26, 36) that would warrant treating this as in the slightest degree aberrant. Similarly, *see Sullivan v. O'Connor*, 296 N.E.2d 183, 185-86 (Mass. 1973) (if contract actions against doctors for failure to effect a cure "can be readily maintained," doctors may be "frightened into practicing defensive medicine," but if such actions are "outlawed" entirely, then "the public might be exposed to the enticements of charlatans"; therefore "the law has taken the middle of the road position of allowing actions based on alleged contract, but insisting on clear proof").

²⁵⁰ A much more recent version of *First Options*, and to precisely the same effect, is [Roe v. Ladymon](#), 318 S.W.3d 502, 514 (Tex. App. 2010) (partner of a contracting party signed only in his individual capacity; that he "participated in the arbitration proceedings and actually invoked the arbitrator's power ... by filing his objection requesting he be dismissed" does not amount to a "clear and unmistakable" agreement to let the arbitrator decide whether he is bound).

²⁵¹ See Rau, "Separability," supra note 1, at 108 (the *First Options* requirement of "clear and unmistakable" evidence is "increasingly becoming marginalized," and "has now become little more than a 'limited' and 'narrow exception' to a more general imperative of arbitral competence"); Rau, "Consent," supra note 53, at 90-91 (American courts have overwhelmingly tended to find that the generic 'broad' arbitration clause presumptively amounts to a grant to arbitrators to make a final determination of their own jurisdiction"); cf. Rau, "Arbitrability," supra note 11, at 368 (however, in cases that are not "run-of-the-mill," "limited or idiosyncratic arbitration clauses" might present a court with "sufficient ambiguity" to require "the reassurance of 'clear and unmistakable' evidence to the effect that scope or timeliness issues were to be for the arbitrators").

²⁵² *First Options of Chicago, Inc.*, 514 U.S. at 945. In other words, if the question is *whether language or behavior should be interpreted* so as to entrust arbitrators with the power to decide their own jurisdiction, the answer will presumptively be "no" -- unless the parties have clearly told us that's what they intended to do. In this sense the standard is consciously and expressly crafted to be the precise mirror image of the usual "presumption of arbitrability" -- which is equally a default rule of construction, but which assumes, in the absence of a statement to the contrary, that a given dispute was indeed intended to be the subject of arbitration. See *id.* at 944-45 ("the law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable ... for in respect to this latter question the law reverses the presumption'") (emphasis in original). See also *Wolf v. Nissan Motor Acceptance Corp.*, 2011 WL 2490939 at *4 (D.N.J. Jun. 22, 2011) (given "the presumption favoring judicial determination of arbitrability, the arbitrability clause must be clear, precise, and entirely unequivocal, free from ambiguity or multiple interpretations"); compare *Awuah*, 554 F.3d at 11 (AAA Rule 7(a) "is about as 'clear and unmistakable' as language can get" in allowing "the validity of the arbitration clause" to be decided by the arbitrator).

Then there are cases that do focus on contractual ambiguity but somehow manage to miss the point anyway: In *Hartley v. Superior Court*, 127 Cal. Rptr. 3d 174, 180 (Cal. App. 2011), the contract had incorporated the JAMS rules, similar to those of the AAA -- but also provided that "nothing contained in this Agreement shall in any way deprive a party of the right to obtain provisional, injunctive, or other equitable relief from a court of competent jurisdiction." The court noted that "a claim that a contract is unenforceable on the ground of unconscionability is an equitable matter" -- and held that in consequence there had been no "clear and unmistakable" delegation to the arbitrator of the power to determine the unconscionability of the arbitration clause. Well, that's not really what "equitable relief" was intended to convey, is it? (Might the old *ejusdem generis* canon be of any help here?) But all right, draftsman, go off and try again; we can be sure you'll do better next time.

²⁵³ But cf. *Lepera v. ITT Corp.*, 1997 WL 535165 at *3 n.2, *4 (E.D. Pa. Aug. 12, 1997); similarly, see *Murphy v. Check 'N Go of California, Inc.*, 67 Cal. Rptr. 3d 120, 123 (Cal. App. 2007) (arbitration clause covered any claim "that this Agreement is substantively or procedurally unconscionable," but this does not constitute a "clear and unmistakable" grant of authority to the arbitrator; "while the language of the agreement could not be clearer, plaintiff's alleged assent to this provision was vitiated by the fact that it was set forth in a contract of adhesion").

An even more striking illustration of precisely the same error appears in Justice Stevens' dissent in *Rent-A-Center* -- where he writes that the employee's "claim that the arbitration agreement is unconscionable undermines any suggestion that he 'clearly' and 'unmistakably' assented to submit questions of arbitrability to the arbitrator," *Rent-A-Center, West, Inc.*, 130 S.Ct. at 2784. In addition to its misuse of the *First Options* test, this passage rather glaringly conflates a) questions going to the merits, with b) questions going to the proper decision-maker: A claim that a contract is invalid because "unconscionable" need not be in the slightest tension with a finding that the parties had (in their contract) delegated the power to decide this issue to their arbitrators; this after all is an idea that should be familiar enough from *Prima Paint*. On Justice Stevens' apparent difficulty in coming to terms with *Prima Paint*, see text accompanying notes 273-78 *infra*.

²⁵⁴ And so I suppose the court in *Lepera* is correct in holding that (at least where the agreement is contested) a motion to compel arbitration should be treated as a motion for summary judgment, thereby giving the opposing party the benefit of all reasonable doubts and inferences. *Lepera*, 1997 WL 535165 at *3.

²⁵⁵ Cf. *id.* at *4.

Compare *Rent-A-Center, West, Inc.*, 130 S. Ct. at 2778 n.1 (the *First Options* "clear and unmistakable" requirement "pertains to the parties' *manifestation of intent*, not the agreement's *validity*"; § 2's "grounds for revocation" of a contract "do not include, of course, any requirement that its lack of unconscionability must be 'clear and unmistakable'") (Scalia, J.) (emphasis in original). I'd like to think I made much the same point, in a slightly different form, over a decade ago. See Rau, "Separability," supra note 1, at 95 n.241.

²⁵⁶ Horton, *supra* note 187, at 129.

²⁵⁷ [Rent-A-Center, West, Inc.](#), 130 S.Ct. at 2779.

²⁵⁸ *Id.*

²⁵⁹ See the lucid discussion in Stipanowich, *supra* note 129, at 364-66. I am not even sure, though, that Justice Scalia sees this as a true “analogy” -- with all that ought to imply about the need for inquiry into whether similar policies are in play in cognate cases -- as opposed to a simple syllogism.

²⁶⁰ [Buckeye Check Cashing, Inc. v. Cardegna](#), 546 U.S. 440 (2006); see generally the discussion in Rau, *supra* note 192. I already noted at the time that the subject of “separability” “obviously sparked no intense interest” in the author of the opinion; *id.* at 14.

²⁶¹ See [Rent-A-Center, West, Inc.](#), 130 S. Ct. at 2778 n.2; [Cardegna](#), 546 U.S. at 444 n.1. See generally the discussion at note 220 *supra*; Rau, *supra* note 192, at 17-27 (these are “nothing but word balloons”).

²⁶² See [Rent-A-Center, West, Inc.](#), 130 S. Ct. at 2778-79; [Cardegna](#), 546 U.S. at 449; Rau, *supra* note 192, at 14-17 (“a careless turn of phrase”).

²⁶³ To my bemusement this view actually appears to be quite widespread; the many cases subscribing to it are exemplified by [Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.](#), 622 F.3d 996, 1000, 1000 (9th Cir. 2010) (what is for the arbitrator is a challenge to “the validity of the contract, including derivatively the validity of its constituent provisions (such as the arbitration clause)”; what by contrast is for the court is a claim that the arbitration clause is unenforceable “for reasons independent of any reasons the remainder of the contract might be invalid”); [Man Fong Wong v. 1st Discount Brokerage, Inc.](#), 2011 WL 1298857 at *4 (E.D.N.Y. Jun. 6, 2011) (“as [plaintiff’s] complaint makes clear, she was not only unable to read and understand the arbitration provision; she did not read or comprehend the entire agreement”; therefore “the complaint clearly challenges the contract as a whole”; motion to compel arbitration granted); [Vasquez-Lopez v. Beneficial Oregon, Inc.](#), 152 P.3d 940, 946 (Or. App. 2007) (“the court is the proper forum if the claim addresses only the arbitration clause or if it addresses the arbitration clause under a legal theory that is different from the theory that it deploys to challenge the entire contract”); [Green Tree Financial Corp. of Ala. v. Wampler](#), 749 So.2d 409, 414 (Ala. 1999) (buyers of mobile home claimed that the seller had “held all the documents ... in one hand” and “pointed to where they needed to sign,” without giving the agreement to them or allowing them to ask any questions about it; held, since this allegation of fraud was that the seller had “concealed all portions of the agreement, not merely the arbitration clause” contained in it, this was “in reality an attack on the entire” agreement, and since the challenge was “not only” to the enforceability of the arbitration clause, it was a matter for the arbitrators). Among commentators, *cf.* Friedman, *supra* note 197, at 2065 (“we leave it to arbitrators to assess unconscionability challenges to both the entire contract (including the arbitration provision) and each of the terms of a contract other than the arbitration provision itself”); *cf.* Stipanowich, *supra* note 129, at 365 (“Unfortunately for him, Jackson’s unconscionability challenge was to the whole arbitration agreement, and not just the delegation provision”).

Finally, see Ware, *supra* note 221, at 122 (a signature obtained at gunpoint will “plainly” involve “a challenge to the validity of the contract as a whole, and not *specifically* to the arbitration clause,” and “thus application of the separability doctrine” will deprive the individual of the protection of contract defenses)(emphasis added). I have written that no court -- at least “no court that understood the consensual basis of *Prima Paint*” -- “could ever dream of sending such a dispute to arbitration.” Rau, “Arbitrability,” *supra* note 11, at 336 n.129; note 221 *supra*. Still, who’s listening? You will be amused to learn that the Texas legislature, in its last session, enacted a bill barring a court from ordering arbitration unless it first “determines that the contract containing the agreement to arbitrate is valid and enforceable.” (Happily the reach of the legislation is limited to family-law cases.) The “legislative analysis” justifies this abrogation of *Prima Paint* by explaining that under present law, “if A holds a gun to B’s head and forces him to sign a contract with 15 terms, one of which is an arbitration agreement, the case will be referred to the arbitrator specified in the contract” and “worse, the issue of the contract’s validity must then be tried by the arbitrator specified by the invalid agreement, who is not likely to be impartial if B was enough of a bad actor to pull a gun on A in the first place.”

S.B. No. 1216; <http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=82R&Bill=SB1216> (March 29, 2011).

All the misgivings you should already have had about recourse to state legislation as a vehicle for law reform are here abundantly confirmed.

²⁶⁴ The simple question whether the challenge *encompasses* the arbitration clause need not call for any inquiry into whether that challenge could be considered “the crux of the complaint” -- whatever that could possibly mean; cf. [Nagrapa](#), 469 F.3d at 1263.

²⁶⁵ See, e.g., [In re Morgan Stanley & Co., Inc.](#), 293 S.W. 3d at 190 (correctly perceiving that challenges based on a lack of mental capacity are for the court -- who cares if this is also a challenge to the “whole agreement”? -- and refusing to follow aberrant Fifth Circuit authority to the contrary).

Justice Scalia’s conclusion that none of the employee’s “substantive unconscionability challenges was specific to the delegation provision,” was supported by his observation that “nowhere in his opposition to Rent-A-Center’s motion to compel arbitration *did he even mention* the delegation provision.” [Rent-A-Center, West, Inc.](#), 130 S. Ct. at 2779-80 (emphasis added). Now this is really quite helpful if it is properly understood: I take this to be, not a mere point of pleading, but instead a simple recognition that -- whatever else may conceivably be wrong with the overall agreement -- the resisting party will always be required to make a claim -- and then an actual demonstration -- to the effect that enforceable assent to arbitration is lacking. I don’t suppose a lunatic or a victim of forgery will bother to “mention” a delegation clause either. But then he shouldn’t have to; a lack of assent in such circumstances may be demonstrated simply by an attack on the entire agreement. In other cases, however -- like *Rent-A-Center* itself -- it won’t; cf. [Metcalf v. Merrill Lynch, Pierce, Fenner & Smith, Inc.](#), 768 F.Supp. 2d 762, 771 (M.D. Pa. 2011) (plaintiffs’ allegations of fraud were based on claims that defendants had failed to incorporate into subsequent drafts changes plaintiffs had demanded during the negotiations, but had orally represented that such revisions had been made; however, plaintiffs “fail to identify what changes they demanded concerning the arbitration clause”). See also [Rent-A-Center, West, Inc.](#), 130 S. Ct. at 2780 (conceding that the employee’s challenge would have been for the court if he had “challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable”)(emphasis in original).

²⁶⁶ See Rau, *supra* note 192, at 14, 16-17:

[I]t should be obvious that a challenge can be “to the arbitration clause itself” without being “*specifically* to the arbitration provision” *Prima Paint* does not merely preserve for the courts challenges that are “restricted” or “limited” to “just” the arbitration clause alone -- this would be senseless; *it preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question* [Referring in particular to the extraordinary *Wampler* case, *supra* note 264:] [I]sn’t there something terminally silly about an analysis which permits arbitration just because one party, at the time of contracting, has taken the pains to deceive the other by hiding and covering with his hand -- not merely the arbitration clause -- but *all the other provisions* in the contract as well? Doctrine may certainly facilitate folly -- but it rarely renders folly absolutely obligatory. (emphasis in original)

²⁶⁷ Gary Born has suggested that if challenges are made *both* to the underlying contract and to the arbitration agreement -- challenges which might therefore impeach the arbitration agreement itself -- then such a challenge must “preliminarily” and “in the first instance” be resolved by the arbitrators, and only subsequently addressed in vacatur proceedings. See 1 BORN, *supra* note 66, at 942-43, 958 (a result ironically “very similar” to the “*prima facie* standard applied in France and elsewhere”).

I find this quite puzzling: However desirable as a normative matter, American courts have never in fact proceeded in any fashion remotely similar to this -- nor is it easy to grasp how any such notion of an “interim allocation” could possibly be thought consistent with the mandate of FAA § 4, that a court first actually be “satisfied” that the “making” of an agreement to arbitrate not be “in issue.” On the meaning of this statutory language, see note 197 *supra*. As should be obvious, I suspect the drafters of the FAA were using the words “making” and “agreement” merely as convenient shorthand for “binding contract” -- and were not really trying to anticipate by several generations a Gallic regime of *competence/competence*.

²⁶⁸ The usual position is that American procedure “allows an objecting party to seek judicial determination of the scope of consent either before, during, or after an arbitration,” [Grad v. Wetherholt Galleries](#), 660 A.2d 903, 908 (D.C. App. 1995)(Uniform Arbitration Act).

²⁶⁹ Justice Stevens in dissent does get off a good line here when he points out that the Court’s reading of *Prima Paint* reminds him of “something akin to Russian nesting dolls,” [Rent-A-Center, West, Inc.](#), 130 S. Ct. at 2786. In the same vein he suggests that it seems to require “infinite layers of severability,” *id.* at 2787. This is indeed a neat rhetorical device -- suggesting the theoretical prospect of infinite regress, a hall of mirrors: What of a “delegation clause within a delegation clause,” requiring that the question whether a “delegation” clause is indeed valid and enforceable is *itself a question that the parties may have delegated to the arbitrators*? Then the question for a court under *Rent-A-Center* may be, would it be unconscionable to have the arbitrator decide this -- that is, would it be unconscionable for an arbitrator to decide whether it would be unconscionable for the arbitrator to decide whether the arbitration clause is unconscionable? On this possibility, in slightly different form, see also Horton, *supra* note 187, at 130 n.181.

²⁷⁰ See, e.g., [Rai v. Ernst & Young, LLP](#), 2010 WL 3518056 at *4 (E.D.Mich. Sept. 8, 2010).

²⁷¹ I express this fear only after having read far too many lower court cases. See, for example, [Gutierrez v. Academy Corp.](#), 967 F.Supp. 945, 947 (S.D. Tex. 1997). Here, as in *Rent-A-Center*, an employee challenged a stand-alone arbitration agreement on the ground of “unconscionability.” There was nothing that looked like a “delegation clause.” The court therefore dutifully struggled with *Prima Paint* alone -- and concluded that since the employee’s claims involved a challenge to “the entire agreement -- and not to “any clause in particular -- it was therefore “for the arbitrator to decide whether [the employee’s] allegations are ... sufficient to invalidate the entire [stand-alone arbitration] agreement.” Your guess is as good as mine as to what muddled thought process brought about this outcome, or what in this context the mysterious phrase “any clause in particular” is supposed to connote -- but at least we can see that the holding itself directly contradicts everything we thought we knew. See in particular the text accompanying notes 199-204 *supra*.

²⁷² See the discussion in notes 221, 224 *supra*.

²⁷³ See text accompanying notes 260-62 *supra*.

²⁷⁴ [Rent-A-Center, West, Inc.](#), 130 S. Ct. at 2785, 2787.

²⁷⁵ *Id.* at 2784, 2787.

²⁷⁶ *Id.* at 2785 (italics, for some obscure reason, in the original).

²⁷⁷ What underlies *Prima Paint* is “a strong presumption that once the parties have agreed to arbitrate, they have been willing to submit all disputes to the arbitral forum.” Rau, “Separability,” *supra* note 1, at 99-100. Indeed the lack of any evidence to suggest that this presumption had successfully been rebutted undoubtedly played some role in the Court’s decision; see [Prima Paint Corp.](#), 388 U.S. at 406 (“no claim is made that *Prima Paint* ever intended that ‘legal’ issues relating to the contract be excluded from arbitration”).

²⁷⁸ See the discussion of Justice Scalia’s opinion at note 265 *supra*.

²⁷⁹ Compare [Sphere Drake Ins. Ltd., v. All American Ins. Co.](#), 256 F.3d 587 (7th Cir. 2001), with [Sphere Drake Ins. Ltd. v. All American Life Ins. Co.](#), 221 F. Supp. 2d 874 (N.D. Ill. 2002). In the first stages of this litigation, an insurer claimed that its policy was unenforceable because its alleged “agent” had exceeded the dollar limit of policies that it was authorized to issue on the insurer’s behalf. This claim of “lack of authority” was held to call into question the existence even of the policy’s arbitration clause -- and thus required a judicial determination. The complaint was later duly amended to allege that the “agent,” “acting with the knowledge of or in conspiracy” with the insureds, had “breached its fiduciary duty by issuing policies on [the insurer’s] behalf that were commercially unreasonable and/or designed to benefit ... the alleged coconspirators.” The court found *this* complaint analogous to a claim of fraud in the inducement -- and held that it was therefore a matter for the *arbitrators*.

²⁸⁰ I would never have thought it possible that characterizing someone as “too clever by half” could actually be understood as pejorative -- as opposed, say, to being a sign of grudging or envious admiration. *But cf.* Schwartz, *supra* note 37, at 21 (“I blame Justice Breyer insofar as he is the author of several of these short-sighted, tactical, too-clever-by-half opinions”). Yet I guess I am beginning to come around.

²⁸¹ It may originally have been supposed that the principle of “separability,” which Justice Fortas’ opinion in *Prima Paint* roots firmly in § 4 of the Act, was “applicable” only in federal courts. But I’ve never been terribly taken by the claim that certain “sections” of the FAA properly “apply only” in federal courts, and certain others “don’t apply”: The proper approach is always the familiar and functional “reverse-*Erie*” inquiry, which is aimed at determining to what extent states may be expected to adapt their local “procedure” to honor the “substantive” commands of the Act; see Alan Scott Rau, [Federal Common Law and Arbitral Power](#), 8

[NEV. L.J. 169, 192-97 \(2007\)](#). So the *Cardegna* decision, *supra* note 260, at last made it clear that as an emanation from § 2, and “as a matter of substantive federal law,” “separability” must be honored by state courts as well; see Rau, “Separability,” *supra* note 1, at 84-92 (“Justice Fortas’ exclusive reliance on § 4 was transparently just a way station: It is surely only the smallest of steps from the proposition that federal substantive law ‘overrides state law to the contrary’ in federal courts, to the conclusion that state courts are equally bound by this law”).

See also the discussion in notes 32 & 171 *supra* (“federalism” in *Bazzle* and *Stolt-Nielseri*).

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See note 69 *supra*; Rau, “Separability,” *supra* note 1, at 93 (“just who is to decide the level #2 issue? Is it ... for a court to determine the extent of the arbitrator’s jurisdiction? Or are there circumstances where an arbitrator himself may have the ‘primary power’ to pass on his own authority?”).

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Here’s a small thought experiment: Suppose that in the 1964 consulting agreement between Flood & Conklin and Prima Paint, § 87 set out a number of representations made by F&C with respect to its business -- covering, for example, its current list of customers, and its financial ability to perform its contractual obligations. Section 88 recited that Prima Paint had relied on these representations, so that if any should turn out to be false, it might ultimately be entitled to seek damages and even rescission. And § 89 recited a recognition by both parties that should it later be alleged that any of these representations were false, or that the falsehoods were intentional, difficult factual inquiries would be required -- with the result that they were now willing to submit themselves in advance to arbitration -- to determine, not only questions with respect to the quality of F&C’s performance, but also questions with respect to whether F&C had *misrepresented* the quality of its performance.

In these circumstances it is clear, is it not, that the Supreme Court’s actual decision in *Prima Paint* will have become quite irrelevant? And so -- for precisely the same reason, but now with respect to the validity of the arbitration clause itself -- it would equally be irrelevant in *Rent-A-Center*.

Perhaps, as Justice Stevens urges in dissent, the “underlying rationale” of *Prima Paint* was that, where “questions of arbitrability are bound up in an underlying dispute,” the “national policy favoring arbitration” would then come into play, militating in favor of entrusting both questions to the arbitrator. From this starting point he arrived at the conclusion that *Prima Paint* is inapposite here -- because in *Rent-A-Center*, “resolution of the unconscionability question will have no bearing on the merits of the underlying employment dispute.” *Rent-A-Center*, 130 S. Ct. at 2787-88. Now *Prima Paint* is indeed inapposite here -- but for completely different reasons: The primary significance of any “intertwining” of challenges to contract validity with the dispute on “the merits,” is that it suggests the parties *must be presumed to have wished to maximize efficiency by submitting both questions to a single adjudicator at the same time*. See text accompanying notes 191 - 92 *supra*. Here, by contrast, any such presumption is quite beside the point once the proper decision-maker has been *the subject of an express conscious choice*.

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See, e.g., Jean R. Sternlight, [Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration](#), 74 WASH. U. L.Q. 637 (1996).

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This would also involve spinning out a contemporary definition of “consent” -- preferably one free of any quaint and quixotic notion to the effect that a weaker party’s acquiescence in market power can only be legitimated by some transcendent insight or internal transformation. Compare Horton, *supra* note 187, at 148 (the “attenuated ‘assent’” common to adhesion contracts “deviates sharply from the goal of a private representative process, which seeks to achieve a true consensus among affected individuals and groups”); Horton, *supra* note 149, at 435 (“being bound to a duty to which one did not knowingly agree violates autonomy principles”). If it is clear that no adhesion contract is even remotely expected to be read or understood, it should follow that “arbitration specified in a form contract must be treated just like any other clause of the form”; see [Carbajal v. H & R Block Tax Services, Inc.](#), 372 F.3d 903, 906 (7th Cir. 2004) (Easterbrook, J.); see also Rau, “Separability,” *supra* note 1, at 8-13 (“‘agreement’ here has no meaning that is in any way different from the use of the term every day in the realm of contract”).

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Horton, *supra* note 187, at 142.

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See Rau, *Integrity*, *supra* note 232, at 133 (“the argument, then, is that the arbitration process should never be viewed as separate and apart from the overall process by which substantive contract terms are hammered out”). Cf. [UCC § 2-302](#) cmt. 1 (“the principle [of “unconscionability”] is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power”).

I would not have thought that the “delegation” clauses which are privileged by *First Options* and *Rent-A-Center* would have much in common -- other than the same collocation of letters -- with the “delegation” of Article I powers proscribed by the Supreme Court in such warhorses as *Carter Coal* and *Schechter Poultry*: For one thing, the Article I monopoly on “lawmaking” is obviously

concerned with the exercise of power over non-consenting parties. *But see* Horton, *supra* note 187, at 134-42 (“the private Nondelegation Doctrine”), 105 (“the Court’s interpretation of the FAA does not comply with this constitutional mandate”). The argument there comes perilously close to asserting that the enforcement of any private contract affecting the “substantive rights” of consumers and employees would, at least in the absence of a muscular judicial review, violate the Constitution.

²⁸⁸ *Id.* at 105.

²⁸⁹ The French Civil Code, promulgated in 1804, tells us that “contracts legally formed take the place of law [*tiennent lieu de loi*] for those who have entered into them.” Code Civ. (Fr.) Art. 1134. The draftsmen undoubtedly understood, as do we, that this is largely metaphor.

²⁹⁰ That is, the question is not whether there turns out to be some asymmetrical allotment of “costs” and “benefits,” of “advantages” and “hardship” -- which after all is only to be expected -- but whether “it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice,” [Carlson v. Hamilton](#), 332 P.2d 989, 990-91 (Utah 1958).

²⁹¹ For example, I would hope -- almost two decades after *First Options* extended the protection of §§ 2 and 10 to “agreements” entrusting questions of “arbitrability” to arbitrators -- that state courts could no longer find such agreements to be *themselves* “indicia of unconscionability.” Nevertheless see [American General Finance, Inc. v. Branch](#), 793 So.2d 738, 749 (Ala. 2001) (so holding); [Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp.](#), 123 Cal. Rptr. 3d 547, 554 (Cal. App. 2011) (“there is substantial authority that a delegation clause in an adhesion contract is unconscionable”); [Ontiveros v. DHL Express \(USA\), Inc.](#), 79 Cal. Rptr. 3d 471, 481 (Cal. App. 2008) (where “one party tends to be a repeat player, the arbitrator has a unique self-interest in deciding that a dispute is arbitrable”).

Similarly, I would hope -- almost two decades after [Doctor’s Associates, Inc. v. Casarotto](#), 517 U.S. 681 (1996) -- that state courts could no longer find arbitration clauses to be “unconscionable” merely because they were “preprinted,” “not in bold face,” and did “not have any underlining nor any other effect which alert the reader of the importance of its terms.” Nevertheless see [East Ford, Inc. v. Taylor](#), 826 So.2d 709 (Miss. 2002) (so holding); [Gonski v. Second Judicial District Court](#), 245 P.3d 1164, 1170 (Nev. 2010) (the arbitration clause “is printed in normal-sized font and located on page 15 of an 18-page document and in the midst of identically formatted paragraphs”); *cf.* Scott J. Burnham, *The War against Arbitration in Montana*, 66 MONT. L. REV. 139, 200 (2005) (later Montana decisions have managed to “avoid the pitfalls of *Casarotto*” by purporting to base their reasoning “on fundamental principles of contract law” such as the doctrine of “reasonable expectations”). Recall that the adverse interpretative presumption required by *First Options* -- giving rise to the “clear and unmistakable” trope -- is properly directed only to the clarity and not to the quality of assent; *see* text accompanying notes 252-53 *supra*.

²⁹² Might a “delegation” clause, as well as the arbitration clause generally, be challenged on the ground that it requires a claimant to initiate proceedings alleging wrongful termination within 90 days, although state law would give him four years to file a claim? *Cf.* [Openshaw](#), 731 F. Supp. 2d at 994 (“that is simply not enough time, especially when one considers that the contractor has lost his or her job, has little or no money, and is understandably emotional and upset”). Or on the ground that it prohibits the arbitrator from issuing a reasoned award? *Cf. id.* at 997 (“this provision will interfere with a reviewing court’s effort to efficiently administer justice”; “there is a significant difference between not requiring written opinions and prohibiting them”). Or on the ground that a stipulation of “confidentiality” may prevent plaintiffs from having access to the same information about the background of the arbitrators that is enjoyed by repeat players? *Cf.* [Luna v. Household Finance Corp. III](#), 236 F. Supp. 2d 1166, 1180-81 (W.D. Wash. 2002).

²⁹³ *See* text accompanying notes 263-68 *supra* (the ambiguity of “specifically”).

²⁹⁴ At oral argument, Justice Scalia suggested that if arbitration clauses in adhesion contracts were to be subject to judicial challenges for “unconscionability,” there would be “not much use signing an arbitration agreement then, not much for the employer, he is going to end up in court anyway ... Kiss good-bye to arbitration.” [Rent-A-Center, Oral Argument, supra note 206](#), 2010 WL 1654083 at *52-*53. *See also* Stipanowich, *supra* note 129, at 350 (“a singularly effective way of making arbitration a procedural black box, hermetically sealed from court intrusion”).

- ²⁹⁵ Cf. Horton, *supra* note 187, at 153 (“the delegation clause all but abolishes court oversight of private procedural rulemaking”); Schwartz, *supra* note 37, at 8 (the “breathtaking” implication of *Rent-A-Center* is that “would-be [sic] defendants [can] add a simple contract term that would deprive a court of any power to review the enforceability of an arbitration agreement”). As Conrad’s Marlow was advised, “*du calme*.”
- ²⁹⁶ Petra Pasternak, *Class Action Ruling an Earthquake for California Litigation*, THE RECORDER, April 27, 2011, at 20.
- ²⁹⁷ See text accompanying note 41 *supra*.
- ²⁹⁸ See text accompanying note 45 *supra*.
- ²⁹⁹ Since many state judges are elected, they will often act as if they were “accountable to the consumers and the employees that businesses (often out-of-state businesses) attempt to bind to arbitration agreements,” Bruhl, *supra* note 180, at 1435. And, of course, to vocal local entrepreneurs such as fast-food franchisees or distributors, who find themselves equally constrained. And, need I add, to the plaintiffs’ lawyers at the local courthouse who represent them. But perhaps the same point can be reframed in such a way as to aspire to a higher level of principle? It has quaintly been suggested that what we see playing out here, once again, are the civil rights struggles of the mid 20th century -- but this time, in an ironic reversal, it is the local courts who in their resistance to an overweening and imperial federal judiciary are positioned as the protectors of the defenseless and downtrodden, e.g., Knapp, *supra* note 180, at 628 (“once again the ability of relatively powerless individuals to have unfettered access to their governmental institutions is being threatened by powerful interests who seek to deny that access”).
- ³⁰⁰ The *Concepcion* case itself turned on the trial court’s refusal on grounds of “unconscionability” to enforce a contractual provision to the effect that “no Arbitrator has the authority to ... order consolidation or class arbitration.” [Laster, 2008 WL 5216255 at *2](#). Prior to that point the leading case was the California Supreme Court’s 2005 decision in *Discover Bank*, *supra* note 244. Dissenting in the 9th Circuit’s decision in *Nagrampa* (not a putative class action) the following year, Judge Kozinski was prescient in suggesting that he “would not be the least surprised to see the Supreme Court of the United States soon take a close look at whether the unconscionability doctrine, as developed by some state courts, undermines the important policies of the [Arbitration Act](#),” [Nagrampa](#), 469 F.3d at 1313.
- ³⁰¹ In *Discover Bank* itself the trial court, after finding the class “waiver” unconscionable, had nevertheless granted the defendant’s motion to compel arbitration -- but left it open to the plaintiff to “seek to certify an arbitration class”; this was apparently done under pre-*Bazze* California authority that left the decision to order class-wide arbitration to “the trial court’s discretion.” See [Keating v. Superior Court](#), 645 P.2d 1192 (Cal. 1982), *rev’d on other grounds*, [Southland Corp. v. Keating](#), 465 U.S. 1 (1984). But cf. [Gentry v. Superior Court](#), 165 P.3d 556, 570, 575 (Cal. 2007) (“if the trial court invalidates the waiver on public policy grounds, then the parties may proceed to class arbitration ... unless the trial court determines “instead [that] the arbitration agreement as a whole should be invalidated”).
- ³⁰² Cf. Christopher R. Drahozal, [Franchising, Arbitration and the Future of the Class Action](#), 3 ENTREPRENEURIAL BUS. L. J. 275, 294 (2009) (if a contractual waiver of class arbitration is unenforceable but severable, the court will “nonetheless send the case to arbitration”; since the contract is now “silent on whether class arbitration is permitted,” this “likely will result in the arbitration proceeding on a class basis”). In [Muhammad v. County Bank of Rehoboth Beach](#), 912 A.2d 88, 103 (N.J. 2006), the court found the class-arbitration waiver to be not enforceable but “severable,” for “the contracts reflect an intention that the arbitration agreement would be implemented whether and to whatever extent class-wide arbitration might be barred.” It was not made perfectly clear what would happen next. (The contract had provided for an NAF arbitration, under whose rules class-wide proceedings were excluded “unless all parties consent”).
- ³⁰³ I argued earlier that arbitrators may no longer escape the federal default rule of *Stolt-Nielsen* by relying on some contrary state-law rules of construction, see text accompanying notes 171-74 *supra*; if I am right about that, then it must follow that state courts, too, should be unable to rely on such rules to “manufacture” the requisite consent to class proceedings that under the mandate of *Stolt-Nielsen* must be affirmatively demonstrated. See also [Concepcion](#), 131 S. Ct. at 1750-51. For the practical consequences of an

adjudication by *arbitrators*, under “delegated” powers, to the effect that a class waiver is “unconscionable,” see text accompanying note 248 *supra*. In either case consent that has been withheld, either explicitly or by implication through “silence,” is fatal to an order of class-wide proceedings.

³⁰⁴ See [Fensterstock v. Education Finance Partners](#), 611 F.3d 124, 141 (2d Cir 2010), *vacated and remanded for further consideration*, 2011 WL 338870 (Sup. Ct. June 13, 2011) (“Our conclusion that a given agreement is invalid and unenforceable does not mean that the parties in fact reached the opposite agreement”; striking down the class-arbitration waiver merely “leaves the [agreement] silent” under *Stolt-Nielsen*; defendant’s motion to compel arbitration denied); [In re American Express Merchants’ Litigation](#), 634 F.3d 187, 191, 200 (2d Cir. 2011) (plaintiffs’ complex antitrust claims “cannot reasonably be pursued as individual actions, whether in federal court or in arbitration,” and so the class-action waiver is unenforceable; nevertheless “*Stolt-Nielsen* plainly precludes us from ordering class-wide arbitration,” and so the defendant is given the opportunity “to withdraw its motion to compel arbitration” completely).

³⁰⁵ As the South Carolina Supreme Court remarked in *Bazzle*, “If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement,” [Bazzle](#), 569 S.E.2d at 360. See also [Stolt-Nielsen](#), 130 S. Ct. at 1782 n.10 (Ginsburg, J., dissenting) (“were there no right to proceed on behalf of a class in the first place ... a provision banning or waiving recourse to this aggregation device would be superfluous”).

³⁰⁶ See, e.g., the discussion at notes 157-58 *supra*.

³⁰⁷ [Discover Bank](#), 113 P.3d at 1107-08.

³⁰⁸ Justice Scalia’s puzzling statement in *Concepcion* that “although [California law] does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*,” [131 S. Ct. at 1750](#) (emphasis in original), was perhaps a reference to California cases predating *Bazzle*, see note 301 *supra*. Loose language elsewhere in the opinion in which California is taken to task for “requir[ing] a procedure that is inconsistent with the FAA” merely refers to the fact that California here was interposing class procedures as a pre-condition to enforcement of the agreement. Cf. [Concepcion](#), 131 S. Ct. at 1752 n.8 & 1753. See also Oral Argument, *supra* note 246, [2010 WL 4472577 at *43](#) (Justice Scalia: “the question is not whether they are being forced to accept class arbitration; it’s whether they are being coerced into abandoning regular arbitration”).

³⁰⁹ [Concepcion](#), 131 S. Ct. at 1744.

³¹⁰ Professor Smit asserts that even though a contract contains “a clause providing for arbitration that excludes a class action,” “a class action in court cannot be contractually excluded,” for “a contract cannot legally modify procedures prescribed by the law for adjudication of class-action claims.” Hans Smit, [AT&T Mobility v. Concepcion: Can Class Actions be Brought in Arbitration?](#), 20 AM. REV. INT’L ARB. 469, 471 (2009). Yet there is simply no such thing as a “class-action claim”; see [Caudle v. AAA](#), 230 F.3d 920, 921 (7th Cir. 2000) (Easterbrook, J.) (“a procedural device aggregating multiple persons’ claims in litigation does not entitle anyone to *be* in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants”). On the other hand, there is plenty of federal policy requiring rigorous enforcement of a valid arbitration agreement, however inefficient or “piecemeal” adjudication may become.

³¹¹ [Dean Witter Reynolds, Inc. v. Byrd](#), 470 U.S. 213, 221 (1985).

³¹² “... shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

³¹³ “After all, contract law is essentially state law; so in finding the requisite assent ... it would be natural to look to the ordinary contract law of the state whose law otherwise governs the transaction.” Rau, *Culture*, *supra* note 50, at 490 n.164. See generally [Perry v. Thomas](#), 482 U.S. 483, 492 n.9 (1987) (§ 2 “provides the touchstone for choosing between state-law principles and the

principles of federal common law envisioned by the passage of the statute”; “state law ... is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally”).

³¹⁴ E.g., Neal Troum, *Drawing a Line after AT&T Mobility: How Far Does the FAA Reach into State Contract Regulation?*, 29(7) ALTERNATIVES TO THE HIGH COST OF LITIGATION 129, 134 (July/Aug. 2011) (the FAA “contemplates -- indeed, requires -- courts to look at and interpret state contract law”); Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 74 (“contract formation” issues are “matters to be decided solely under state contract law principles. There is no role for the FAA,” unless state law has “singled out” arbitration agreements for different treatment); Stephen J. Ware, *“Opt-In” for Judicial Review of Errors of Law under the Revised Uniform Arbitration Act*, 8 AM. REV. INT’L ARB. 263, 269 (1997) (the FAA “expressly adopts state contract law”). See also Nagareda, *supra* note 174, at 39 (“When the caveat of § 2 is properly triggered, the federal-law command of § 2 is turned off. As a result, state unconscionability law governs, because ‘there is no other law’ -- that is, no competing FAA command to validate the class waiver”); see also *id.* at 52 (“resolution of the state-law constraint written into the § 2 caveat properly has elicited a more functional, *Erie*-like approach”).

There is a common tendency here to overread *Volt*, but the temptation should be resisted: To say, as the Court did there, that in enacting the FAA Congress did not “inten[d] to occupy the entire field of arbitration,” (*Volt Information Sciences, Inc.*, 489 U.S. at 477) can only be understood -- just like any judicial language -- in light of the question before the court. Recall that the dimensions of state legislative power were not in the slightest degree implicated in *Volt*; the Court’s casual remarks were orthogonal to the flow of the argument -- which was intended merely to underline that *under any possible sensible reading of § 2*, federal law could not stand in the way of parties who wished to subject themselves to alternative rules consciously adopted from state law. But cf. Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1241 (2011) (*Volt* makes it clear that there is no “comprehensive scheme of federal legislation that leaves little room for concurrent state lawmaking”).

³¹⁵ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 220 (1917) (Holmes, J., dissenting). Von Mehren and Trautman referred to this rather more ponderously as “optional supplementation by reference,” ARTHUR VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* 1049 (1965). See also *Southland Corp.*, 465 U.S. at 19-20 (Stevens, J., concurring in part and dissenting in part) (§ 2 “does not define what grounds for revocation may be permissible, and hence it would appear that the judiciary must fashion the limitations as a matter of federal common law”; however, federal policy “does not necessarily require the inexorable application of a uniform federal rule of decision”).

³¹⁶ See generally Rau, “Waiver,” *supra* note 22, at 266-67. And once the decision to apply state law is made, Justice Scalia himself suggested that it may remain “of only theoretical interest” whether the basis for that application is in fact the state’s “own sovereign power” saved from federal “preemption,” or instead “federal adoption” of the state rule. *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

³¹⁷ Cf. Louise Weinberg, *Federal Common Law*, 83 NORTHWESTERN L. REV. 805, 840 (1989). For example, the Copyright Act permits the surviving “children” of an author to renew an initial term of a subsisting copyright, 17 U.S.C. § 304(a)(1)(C). In less enlightened days, once the notion of developing a free-standing federal common law of “childhood” had been put aside as impractical, the federal right became in practice dependent on state family-law definitions; see *de Sylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (“the scope of a federal right is, of course, a federal question,” but we nevertheless “think it proper ... to draw on the ready-made body of state law” unless perhaps the state has used the word “in a way entirely strange to those familiar with its ordinary usage”). More recently, however, explicit legislation has been thought necessary -- in light of evolving social attitudes -- to foreclose discriminatory state practice. See 17 U.S.C. § 101 (“whether legitimate or not”). For other illustrations of the same point, see Rau, *Culture*, *supra* note 50, at 489 (“any lingering tendency to distinguish between ‘arbitrations’ and ‘appraisals’” -- a distinction that is “primarily an historical relic” which “no longer serves much of a visible purpose” -- “can only be aggravated by making the coverage of the FAA dependent on definitions drawn from state law”); Rau, “Waiver,” *supra* note 22, at 275-79 (in many cases, a state version of the UNCITRAL Model law with respect to “waiver” will “seem an undesirable choice for incorporation into the ‘federal common law’ of arbitration”). Cf. Stephen Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, <http://ssrn.com/abstract=921200> (2006) at 15, 21 (as a means of implementing the Hague Convention, one approach would “prefer *ex post* policing of aspects of borrowed state law that are hostile to or inconsistent with federal interests, to *ex ante* specification of uniform federal rules”; nevertheless in any case “norms specified in, and elaborated pursuant to, federal legislation are indisputably federal”).

- ³¹⁸ Rau, “Waiver,” *supra* note 22, at 262 (“When faced with this particularly creaky, skeletal federal statute, badly in need of interlinear reading, the outer limits of ‘interpretation’ are particularly hard to define”).
- ³¹⁹ See LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 20 (1965) (“‘Pure’ contract doctrine is blind to details of subject matter and person. It does not ask who buys and who sells, and what is bought and sold ... When the relationship of parties to land is treated as creating distinctive legal issues, simply because land is involved, this is land law or property law, but not contract.”).
But is there anything in the policies underlying the FAA that could possibly require us to treat § 2 at such a level of generality? Is there any reason to posit an abstract “contract law” somehow floating above those particular areas of special legal treatment which, in the course of this century, have as a practical matter come to constitute the law of private transactions -- “consumer law,” or “employment law,” or “banking law,” or “real estate law,” or “insurance law,” or “landlord-tenant law”? If we take out such categories there may be little left.
- ³²⁰ *Concepcion*, Oral Argument, *supra* note 246, 2010 WL 4472577 at *22 (Justice Kennedy).
- ³²¹ *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995).
- ³²² But see Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 47 (2003) (“I keep coming back to the statutory language that says ‘any contract’” -- “not ‘any contract in the relevant class of contracts,’ but ‘any contract’”); Hayford, *supra* note 314, at 73-74 (“the only safety net for ‘little guys’ is the common law of contracts”); Gary Born, *The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*, <http://kluwerarbitrationblog.com/blog/2011/07/01/the-u-s-supreme-court-and-class-arbitration-a-tragedy-of-errors> (July 1, 2011) (a state law rule which invalidates the parties’ agreement to arbitrate but which is not “generally applicable to all contracts” “fails the most basic requirement of § 2”); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 409 (2004) (the “plain meaning” of § 2 is to the effect that “state laws applicable to arbitration clauses and some other types of contracts, but not all contracts,” are not saved from preemption); Brief of Amicus Curiae American Bankers Ass’n, *AT&T Mobility, LLC v. Concepcion*, 2010 WL 3183853 at *7 (“this Court has never suggested that an arbitration agreement can be held invalid based on a state policy that does not apply to all contracts”; an attack on the “substance of an arbitration agreement” in “a consumer agreement involving small amounts of money and a class action waiver” “necessarily addresses only a narrow class of contract ... and not ‘any’ contract”). Cf. Aragaki, *supra* note 314, at 1246-47 (the existing “Paradigm” -- and “the majority view in the lower courts” -- is “that to avoid preemption, the state law must be basic enough that it extends to literally ‘all contracts.’”).
- ³²³ See *Hacker v. Smith Barney, Harris Upham & Co., Inc.*, 501 N.Y.S.2d 977, 981 (Civ. Ct. N.Y.C. 1986), *aff’d per curiam*, 519 N.Y.S.2d 92 (App. Term 1987).
- ³²⁴ See *id.* A New York statute required contracts “involving a consumer transaction” to be not “less than eight points in depth or five and one-half points in depth for upper class type.” The court refused to enforce the arbitration clause on alternative common-law and statutory grounds. See also *Mitchell v. Amer. Fair Credit Ass’n*, 122 Cal. Rptr. 2d 193 (Cal. App. 2002) (state statute required that any modifications to credit-service agreements be separately signed).
- ³²⁵ UCC § 2-207(2)(b).
- ³²⁶ See WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT 22-23 n.1 (2d Am. ed. 1887) (“an acceptance to be good must in every respect meet and correspond with the offer, neither falling within or going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand”).
- ³²⁷ For one thing, dwelling on the difference between Sales and non-Sales cases would undermine the powerful normative force of the Code, which is increasingly deployed throughout the law of Contracts as “analogy”; cf. *Restatement, Second, Contracts* § 59 cmt. a (“qualified acceptance,” relying on the UCC). But more broadly: What kind of an image do we have of the FAA if we think it expects us solemnly to discriminate between the universalism of Langdell and the sensitivity-to-context of Llewellyn?

³²⁸ [UCC § 2-207](#) cmts. 4 and 5.

See generally ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 677 (4th ed. 2006) (“the idea seems to be that a clause which is sufficiently important and unusual that a party would expect to have his attention specifically directed to it, should not come into the contract by way of a form that is by hypothesis commonly unread”); [Aceros Prefabricados, S.A. v. TradeArbed, Inc.](#), 282 F.3d 92, 102 (2d Cir. 2002) (the seller “submitted un rebutted evidence that arbitration is standard practice within the steel industry, thereby precluding [the buyer] from establishing surprise or hardship”; therefore the arbitration provisions in the seller’s form became part of the contract); [Oceanconnect.com, Inc. v. Chemoil Corp.](#), 2008 WL 194360 at *4, *5 (S.D.Tex. Jan. 23, 2008) (“numerous cases reflect the frequent use of arbitration in maritime contracts”; this “evidence of trade usage and the parties’ course of dealing defeats a claim of surprise” and thus of “material alteration”).

³²⁹ See [UCC § 2-302](#) cmt. 1 (“oppression and unfair surprise”). Professor Friedman suggests that “the doctrine of unconscionability was well established” when the FAA was enacted and that “Congress would surely have been aware of” it; he concludes that the carefully drafted statute “leaves no place for the type of judicial discretion that is the lifeblood of unconscionability,” Friedman, *supra* note 197, at 2042-43, 2055. I am unconvinced. The conceit with respect to Congressional “awareness” seems quaint and unhistorical; the argument, to the extent I understand it, seems premised on the notion that contract-law “doctrines” are static and immutable and thus something very different from what they in fact are -- judicial techniques that may be conveniently at hand to be drawn on for the particular needs of the moment. Above all the assertion is that, since unconscionability is a “rule of judicial discretion” rather than an “all or nothing defense,” the doctrine rubs impermissibly against the policy of § 2 -- which after all “removes” or “strips” or “provides no place for” “judicial discretion” “when it comes to enforcement” of arbitration agreements *Id.* at 2050, 2052, 2056, 2063-64. But this is simply a non sequitur -- as it conflates two quite distinct senses of the same word:

- Modern legal standards, whether with respect to liability or remedial consequences, are notoriously and routinely open-ended -- indeed, indeterminate -- to a far greater extent than they were at the beginning of the last century. That after all is a natural reflection of the deepening of our understanding of the judicial process; the point is hardly limited to the case of unconscionability; see, e.g., [RESTATEMENT, SECOND, CONTRACTS § 351\(3\)](#) (“a court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise”); *id.* at cmt. f. (giving examples of “limitations imposed on damages under this discretionary power”).

- Nevertheless a court responding to doctrine in good faith -- once it has tested enforceability by neutral contract principles -- is obligated within these limits to honor the terms of the arbitration agreement; that is the whole point of *Prima Paint*, see text accompanying notes 197-205 *supra*.

“Unconscionability” remains such a neutral contract principle: The proposition that an arbitration clause that calls for proceedings to take place in Borneo or “at the bottom of a coal mine” must be evaluated exclusively by the arbitrators themselves (at least in the absence of some black-letter finding of initial “duress” or “fraud”) can hardly commend itself to our good sense. Compare [Bazzle, Oral Argument, supra note 31](#), 2003 WL 1989562 at *34, with Friedman, *supra* note 197, at 2064 (“are the arbitrators themselves up to the task of policing arbitration agreements? There is at least some reason to think the answer is ‘yes’”).

³³⁰ Rau, *State Arbitration Law*, *supra* note 22, at 431 (since the virtue of this doctrinal construct “lies precisely in its vagueness,” it “provides abundant opportunity for covert manipulation by a state court inclined not to enforce an arbitration agreement and ingenious enough to conjure up some ill-defined mixture of lack of sophistication, surprise, gross disparity in bargaining power, and ‘harsh or oppressive terms’ lacking any ‘commercial justification’”); see also Bruhl, *supra* note 180, at 1455-59 (“motive, opportunity, and anecdote,” as well as some “systematic evidence,” suggest state-court “manipulation of unconscionability doctrine”).

³³¹ [RESTATEMENT, SECOND, CONTRACTS, § 208](#) cmt. a.

³³² *Id.*; see also [UCC § 2-302\(2\)](#).

³³³ Such as “arbitrator selection, discovery, ... situs of hearings, costs and fees, remedies, and the like,” *cf.* Stipanowich, *supra* note 129, at 357.

³³⁴ [AT&T Mobility LLC](#), 131 S. Ct. at 1758-60 (Breyer, J., dissenting); see also [AT&T Mobility LLC, Oral Argument, supra note 246](#), 2010 WL 4472577 at *10 (Ginsburg, J.: “you are not claiming that, *vis à vis* litigation, arbitration is being disfavored, which was the original concern about arbitration agreements and what prompted the [FAA] ... That is no part of the picture here ... because the rule is the same whether it’s litigation or arbitration”).

³³⁵ See, e.g., [Casarotto](#), 517 U.S. at 687 (“By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts”) (Ginsburg, J.).

³³⁶ See generally Aragaki, *supra* note 314, at 1237-38 (“an anti-discrimination-inspired model of FAA preemption would displace state law only if the law could be said to discriminate improperly against arbitration”; “the central purpose of FAA preemption is to reverse what is perceived to be the law’s longstanding yet irrational hostility toward arbitration”); see also [Baravati v. Josephthal, Lyon & Ross, Inc.](#), 28 F.3d 704, 711 (7th Cir. 1994) (Posner, J.) (“state common law hostile to arbitration is preempted by federal common law friendly to it”).

Framing the problem in this way subtly shifts the terms of the inquiry: We are no longer asked to identify other contexts in which the same state regulatory power is *not* being exercised (apparently critical because if we could, that would undercut its supposed “generality” and applicability to “all” contracts) -- we are asked instead to identify other contexts in which state power is *also* being exercised (apparently critical because if we could, that would rebut the inference that the state has impermissibly “singled out” arbitration for discriminatory treatment). So in the latter case, some “commentators ... have wondered whether a law would be considered general enough as long as it applied on its face to arbitration agreements and at least one other type of agreement,” Aragaki, *supra* note 314, at 1246. Professor Moses apparently reads “any” in § 2 to mean, “some other non-arbitration contract, somewhere”; see Margaret L. Moses, [Privatized “Justice,”](#) 36 LOY. U. CHI. L.J. 535, 541 (2005) (“Congress specifically used the term ‘any,’ not ‘all’”; “therefore, a requirement of conspicuousness could condition the enforcement of an arbitration agreement, because it is a requirement that also conditions enforcement of [some] other contracts”). Although this does indeed seem quite sensible in terms of statutory policy, on a purely semantic level it strikes me as rather high-handed. Cf. [Harrison v. PPG Industries, Inc.](#), 446 U.S. 578, 587, 589 n.6 (1980) (in the EPA, “any other final action” of the Administrator means “all final actions” of the Administrator).

I am a little reminded here of Abraham’s dogged insistence on bargaining with Yahweh over how many other just men had to be identified in Sodom before the city could be saved from destruction: 50? How about 45? 40? 30? 20? “Peradventure ten shall be found there.” Genesis 18: 23-32.

³³⁷ See text accompanying notes 325-28 *supra*.

³³⁸ For the “New York rule” treating arbitration clauses as “per se” “material alterations,” see [Supak & Sons Mfg. Co., Inc. v. Pervel Industries, Inc.](#), 593 F.2d 135, 136 (4th Cir. 1979). For a silly and transparent attempt to evade the problem, see [Jack Greenberg, Inc. v. Velleman Corp.](#), 1985 WL 731677 n.1 (E.D. Pa. Aug. 6, 1985) (“even assuming that it was not a per se material alteration, I would conclude that the clause here was material in that it would deprive Greenberg of its right to come into court to enforce the contract, without first bringing its claim before the Meat Importers Council”). For the recognition that all this is incompatible with federal law, see [Aceros Prefabricados, S.A.](#), 282 F.3d at 100 (“such disparate treatment of arbitration provisions is not permitted”; thus “arbitration agreements do not, as a matter of law, constitute material alterations to a contract; rather, the question of their inclusion in a contract ... is answered by examining, on a case-by-case basis, their materiality under a preponderance of the evidence standard as we would examine any other agreement”); see also [Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela](#), 991 F.2d 42, 46 (2d Cir. 1993) (the New York rule to the effect that “parties will not be held to have chosen arbitration in the absence of an express, unequivocal agreement,” is preempted as being more stringent than state law generally governing “non-arbitration agreements”).

³³⁹ See, e.g., [Carter v. SSC Odin Operating Co., LLC](#), 927 N.E.2d 1207 (Ill. 2010). Under the Illinois Nursing Home Care Act any waiver by a resident of the right to a trial by jury prior to commencement of an action “shall be null and void, and without legal force or effect.” The lower court thought that the statute “embodied a public policy that applied to all contracts generally” and was saved by § 2 as a “legitimate contract defense,” but the appellate court reversed: While discriminatory state laws are clearly preempted, the Supreme Court’s decisions “cannot be read to stand for the converse proposition that state laws avoid FAA preemption so long as they do *not* ‘single out’ arbitration agreements for special treatment.” *Id.* at 1218. See also Hiro N. Aragaki, [Equal Opportunity for Arbitration](#), 58 U.C.L.A. L. REV. 1189, 1208 (2011) (to allow such statutes to avoid preemption, “even though [their] effect is to impose a blanket ban on practically all arbitration agreements,” would lead to “intolerable results”); *but cf. id.* at 1244-45 (the flaw in such statutes is precisely that they *do* discriminate against arbitration, “by practically outlawing arbitration while making jury trials -- arguably the archetypal form of litigation -- the preferred method of resolving such disputes”).

Cf. [Brown v. Genesis Healthcare Corp.](#), 2011 WL 2611327 (W. Va. June 29, 2011). The state Nursing Home Act deems “null and void as contrary to public policy” any waiver by a resident of the right to “commence an action.” The state supreme court reluctantly conceded that the statute “conflicts” with the FAA and was thus preempted. Nevertheless a court was still able to evaluate an admission agreement under the general state contract law doctrine of “unconscionability” -- and here the agreement

was “substantively unconscionable.” Why? Well, the state statute “contains a clear statement of public policy, namely that nursing homes are not to require residents to sign agreements that waive ... a right that is preserved in the West Virginia Constitution”: It would therefore necessarily be “beyond the reasonable expectations of an ordinary person” that the agreement would require him to waive this right. Such a shell game obviously can’t withstand serious scrutiny beyond the Appalachians.

³⁴⁰ On the usual restrictive standard for advance waiver of the right to trial by jury, see [Kenmore Associates, L.P. v. Burke](#), 859 N.Y.S.2d 895, at *1 (Civ. Ct. N.Y.C. 2008) (“courts will indulge every reasonable presumption against waiver”); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 673 (2001) (waivers are “tightly constrained” by the principles that they “may not be lightly implied” and are “narrowly construed”). For the heretical view that this same standard should be applied equally to arbitration agreements, see the irrepressible Montana jurisprudence, e.g., [Kloss v. Edward D. Jones & Co.](#), 54 P.3d 1, 12 (Mont. 2002) (“given the sacredness and inviolability of the fundamental right to trial by jury, any contract provision that openly or subtly causes the forfeiture of the exercise of this right must be rigorously examined”) (Nelson, J., concurring); Carroll E. Neesemann, *Montana Court Continues its Hostility to Mandatory Arbitration*, DISP. RESOL. J. (Feb./April 2003), at 22 (Kloss “exhibits the wide-ranging adverse effects to which the combination of animosity and ignorance can lead”). By contrast, it would be sensible to recognize that any heightened standard for “jury waiver,” as it would disproportionately affect agreements to arbitrate, should be preempted on that ground alone. Cf. [Fitz v. Islands Mechanical Contractor, Inc.](#), 2010 WL 2384585 at *7 (D.V.I. June 9, 2010) (correct result, but relying on the flawed rationale that the local standard is not “generally applicable” to “any contract” but is instead “limited to a specific type of contract -- an agreement involving the waiver of constitutional rights”; cf. text accompanying notes 323-24 *supra*).

³⁴¹ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEO. STUD. 459, 462-63 (2004) (only 1.2% of federal civil cases are resolved by juries, down from 5.5% in 1962). And this despite the supposed doctrinal difficulty of advance “waivers.” See also Kent Syverud, *ADR and the Decline of the American Civil Jury*, 44 U.C.L.A. L. REV. 1935, 1939 (1997) (“Other than the trial bar and an occasional exhilarated juror, is there anyone left in America whose impression of a civil jury trial is so positive that he or she is willing to pay for one?”).

³⁴² This I take it is the point of Justice Breyer’s question during oral argument, raising the possibility of provisions that may be facially neutral but nevertheless operationally discriminatory: “It’s like Switzerland having a law saying, we only buy from cows who are in pastures higher than 9,000 feet. That discriminates against milk from the rest of the continent ... So where is the 9,000 foot cow [here]?” [AT&T Mobility LLC, Oral Argument](#), *supra* note 246, 2010 WL 4472577 at *14.

³⁴³ For example, a version of the Uniform Partnership Act in force in some states provides that while “every partner is an agent of the partnership,” one partner (or fewer than all partners) “have no authority”:

- to assign the partnership property in trust for creditors,
- dispose of the goodwill of the business,
- “do any other act which would make it impossible to carry on the ordinary business of the partnership,”
- or “submit a partnership claim or liability to arbitration.”

[McKinney’s Partnership Law § 20 \(N.Y.\)](#). But isn’t it the case that rules requiring that the authority of any agent to agree to arbitration -- as “an extraordinary method of resolving disputes” -- must be “specially conferred,” “date from an era of judicial hostility to arbitration”? See [Madden v. Kaiser Foundation Hospitals](#), 552 P.2d 1178, 1183 (Cal. 1976) (Tobriner, J.).

At a certain point, though, I suspect that a list of suspect categories may become long enough so that it will appear that any poisonous dose has been diluted to a homeopathic limit of insignificance: Consider, for example, a hypothetical state statute governing the “battle of the forms” which would track the CISG and deem to be “material” any “additional or different term” relating to “the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes.” U.N. Convention on Contracts for the International Sale of Goods, Art. 19(3).

³⁴⁴ For example,

- state courts are apparently expected to construe arbitration clauses in such a way as to presume the arbitrability of the dispute; see [Brennann v. King](#), 139 F.3d 258, 264 (1st Cir. 1998) (“the presumption of arbitrability is a weighty additive to state-law principles of contract construction”); [Prudential-Bache Securities, Inc. v. Garza](#), 848 S.W.2d 803, 806-07 (Tex. App. 1993) (“Texas courts apply Texas procedure and federal substantive law,” under which “doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”).
- As I have argued above, the hallowed doctrine of “separability” -- made binding on the states by *Cardegna* -- is nothing more than an illustration of the very same principle; see note 260 & text accompanying notes 195-96, 277-81, *supra*.
- In addition, state courts may not avoid the high barriers that have been raised by federal common law to a finding that the right to

arbitration has been “waived” -- and may not invoke their usual bright-line rule to deny arbitration to a litigant who (perhaps after considerable vacillation) attempts belatedly to initiate the arbitral process; see [NOS Communications, Inc. v. Robertson](#), 936 F. Supp. 761, 765 (D. Colo. 1996) (“if, in applying Maryland law ... one were to conclude that by filing a complaint in this court and seeking preliminary injunctive relief in this court, NOS waived its right to arbitration, the effect would be to undermine the federal policy of favoring arbitration”); see generally Rau, “Waiver,” *supra* note 22, at 242-43, 268-79.

³⁴⁵ See text accompanying notes 158-62 *supra* (class-wide proceeding “changes the nature of arbitration”).

³⁴⁶ [Concepcion](#), 131 S. Ct. at 1748, 1751, 1753.

³⁴⁷ *Id.* at 1748, 1750 n.6; see note 247 *supra*.

³⁴⁸ Cf. Born, *supra* note 322 (“the foundation for the Court’s reasoning was its claim that class arbitration was not really arbitration in the sense contemplated by the FAA”). One common version of current preemption doctrine, put forward by the hapless drafters of the RUAA, is in fact apparently premised on this notion, that states are barred from imposing restrictions that “go to the essence of the agreement to arbitrate” and which thus “alter the terms of the parties’ agreement such that the procedure being enforced is no longer ‘arbitration’”; cf. Drahozal, *supra* note 322, at 417-18.

³⁴⁹ Cf. FRANS DE WAAL, THE APE AND THE SUSHI MASTER: CULTURAL REFLECTIONS BY A PRIMATOLOGIST 30-31 (2001) (“definitions are rarely neutral,” but “mirror entire world views”).

³⁵⁰ See generally Rau, *Culture*, *supra* note 50, at 466-67 (the FAA as “expansionist”; “the gravitational force of arbitration has ... swept aside much attention to definitional niceties and to historical archetypes”), 467-469 (“non-binding arbitration”). At the very least one sets out by asking the question that I always recommend to law students as the beginning of wisdom: “Just why do you want to know?” For this reason I can’t share the view that “the ultimate question of whether a procedure qualifies as ‘arbitration’” should be treated as “entirely binary,” so that “a procedure either is or is not arbitration,” cf. Strong, *supra* note 126, at 48. I might, for example, believe that parties should be able to harness the arbitration statute even to enforce participation in a contractually agreed process like mediation -- but this would hardly imply that mediators have statutory authority to “summon in writing any person to attend before them,” see Rau, *Culture*, *supra* note 50, at 469-73, 500-03 (it is hard “to imagine any principled reason why ... an attempt to enforce a private commitment to pursue out-of-court settlement should have to go forward encumbered with all the trappings of full-scale litigation”; courts “may treat the statute as subject to a process of dynamic growth,” and when summoned to act in aid of a private process should “ask, in each particular case, whether and to what extent the goals of the statutory mechanism are being served”).

³⁵¹ See Born, *supra* note 322 (“taken at face value, the suggestion [is] that the FAA protects only or primarily a particular historical conception of arbitration -- involving informal, small bipartite trade disputes”); Strong, *supra* note 126, at 42, 47 (“it is necessary to define the nature of arbitration,” “since the conclusion that a particular procedure is not ‘arbitration’ can impose significant burdens on parties,” for example, in their ability to “take advantage of laws that limit judicial review or that allow a court to compel participation in the proceedings”).

³⁵² By contrast, cf. Judith Resnik, [Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers](#), 125 HARV. L. REV. 78, 127 (2011) (“the majority’s insistence that contract terms had to be enforced could, depending on the clauses written, be in tension with its view that the FAA imposed the rule of bilateral arbitrations”; “the counterfactual hypothetical is, of course, that a provider might oblige class arbitration”). But whether *Concepcion* could in any meaningful sense be thought to hold that the FAA “imposed” bilateral arbitration -- as opposed to merely preventing the states from “imposing” anything else -- is precisely the question; given all of the preceding analysis, the suggestion seems highly dubious.

³⁵³ [Concepcion](#), 131 S. Ct. at 1751.

³⁵⁴ William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 252 (1979). See text

accompanying notes 339-43 *supra* (pre-dispute waiver of the right to a jury trial).

³⁵⁵ See [Concepcion](#), 131 S. Ct. at 1751 (“the switch from bilateral to class arbitration ... makes the process slower, more costly, and more likely to generate procedural morass than final judgment”).

³⁵⁶ See generally Rau, “Consent,” *supra* note 53, at 96-97 (one reliable move in the choice of any appropriate default rule “is to presume intent on the basis of what will reduce overall costs, maximizing a joint surplus that the parties can in bargaining divide among themselves”); see also text accompanying notes 161-64 *supra* (explaining the default rule of *Stolt-Nielsen*).

³⁵⁷ See [Concepcion](#), 131 S. Ct. at 1749 (the view of the dissenters in *Concepcion* “would frustrate both” of the goals of the FAA -- “enforcement of private agreements and encouragement of efficient and speedy dispute resolution”)(emphasis in original). See also [d’Antuono v. Service Road Corp.](#), 2011 WL 2175932, at *17 (D. Conn. May 25, 2011) (class-action waivers, with their “general tendency to reduce ... the vexation associated with ordinary litigation,” “further the very goals that make arbitration a favored procedure in Connecticut”).

³⁵⁸ See [Concepcion](#), 131 S. Ct. at 1758 (“class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere”) (Breyer, J., dissenting); [AT&T Mobility LLC, Oral Argument](#), *supra* note 246, 2010 WL 4472577 at *42 (“class arbitration has existed for a quarter century, so it’s not something that is foreign to arbitration”) (counsel for respondents *Conceptions*). See also text accompanying notes 42-44 *supra* & note 43 *supra*. But surely we can’t be blind to the fact that these class arbitrations were overwhelmingly filed and approved prior to *Stolt-Nielsen* - and thus were cases where “consent” to the process was to say the least problematic. See [AT&T Mobility LLC, Oral Argument](#), *supra* note 246, 2010 WL 4472577 at *55 (counsel for petitioner AT&T making this point); see also notes 43, 158 *supra*.

³⁵⁹ For California to restrict enforcement of arbitration agreements to cases where the parties had actually *contracted around* the *Stolt-Nielsen* default would in effect be to impose something of a Hobson’s choice -- since the drafter’s unfailing response would be to resign itself to litigation -- where, among other things,

- it might be more optimistic about success in ultimately resisting certification of a class;
- and where it can be assured that judicial review both of class certification and final judgments will be on the “merits.”

See Samuel Issacharoff & Erin F. Delaney, [Credit Card Accountability](#), 73 U. CHI. L. REV. 157, 179 (2006) (the “‘devil you know’ phenomenon is compounded by the uncertainty of judicial review of class certification in arbitration and the concomitant fear of a ‘renegade arbitrator’ certifying a class and exposing a company to massive liability”); [AT&T Mobility LLC, Oral Argument](#), *supra* note 246, 2010 WL 4472577 at *42 (“AT&T says” that class arbitration is “the worst of both worlds. You get all the procedures, you get broad liability, but at the same time you have no judicial review” (Kagan, J.)). My American Express cardholder agreement not only requires arbitration “on an individual basis” (“there shall be no right or authority for any Claims to be arbitrated on a class action basis”), but goes on to provide that in addition, should this restriction “be deemed invalid or unenforceable, then the entire Arbitration Provision (other than this sentence) shall not apply.” That last parenthetical phrase is an endearing bit of lawyerly caution, isn’t it?

³⁶⁰ [Concepcion](#), 131 S. Ct. at 1749, 1752 n.8. See also Philip J. Loree, Jr., *More FAA: Why AT&T Mobility Makes Sense -- And Why It Likely Isn’t the End of Class Arbitration*, in 20 ALTERNATIVES TO THE HIGH COST OF LITIGATION 145, 150 (Sept. 2011) (the teaching of *Concepcion* is that the FAA “promotes arbitration” by “reduc[ing] demands on the public fisc”; by “making arbitration an attractive alternative to litigation [the statute] serves important governmental and public interests by shifting to private parties substantial time and money costs that otherwise would be incurred by an overburdened and publically financed judiciary”).

³⁶¹ See text accompanying notes 301-04 *supra*.

³⁶² This evident fact explains Justice Breyer’s tongue-in-cheek observation that since “a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims,” then “if speedy resolution of disputes were all that mattered, ... the *Discover Bank* rule would reinforce, not obstruct, that objective of the Act,” [Concepcion](#), 131 S. Ct. at 1759-60 (Breyer, J., dissenting).

³⁶³ *Id.* at 1752. To then add, as he does, that “class arbitration would be no different” strikes one as an accidental afterthought.

³⁶⁴ A state enacts a version of the Uniform Prudent Investor Act, which reverses the much-criticized historical rule prohibiting trustees from delegating investment and management functions. It permits a trustee to delegate such functions “that a prudent trustee of comparable skills could properly delegate under the circumstances.” And if he exercises “reasonable care, skill and caution” in doing so, he is not liable to the beneficiaries for actions of the agent whom he selects. The statute qualifies this, however, by adding an exception: The trustee remains liable if under the terms of the delegation, “the trustee or a beneficiary of the trust is required to arbitrate disputes with the agent.” [TEX. PROP. CODE § 117.011](#).

Note that this state law does not really affect the “validity, irrevocability, [or] enforcement” of any arbitration agreement (or award), something that would bring it into direct conflict with the literal terms of § 2: The assumption, on the contrary, is that *the beneficiary will in fact be bound to arbitrate, and bound also by the results of any arbitration* initiated against an agent to whom trust functions have been delegated. So the state law is not “enforcement impeding” -- i.e., it “does not stand as an obstacle to the enforceability of arbitration agreements,” Aragaki, *supra* note 314, at 1242-43 (such a law “is never preempted by § 2, even if the law encumbers arbitration in other ways”). The rule is instead one of *the trustee’s substantive liability*: A trustee may in the ordinary case escape liability to the beneficiary if he prudently delegates his functions to an agent; however, he may not escape liability -- the beneficiary still retains all of his pre-statutory rights against the trustee -- if, no matter how prudent the delegation, the trustee has in addition included an arbitration clause.

The engine driving this Texas variation on the uniform legislation is thus either

- the fear that the beneficiary may be inadequately protected -- that he needs in such cases the additional protection of a cause of action against the trustee himself; or
- the desire on the part of the plaintiffs’ trial bar to keep before local juries at least some suits brought by beneficiaries in Texas.

(Perhaps these are just two different ways of saying the same thing). The legislation thus has both the intent and the effect of structuring private law so as to make resort to the arbitral process less attractive to contracting parties -- since, whenever the prudent trustee agrees to arbitration, his insulation from liability to a dissatisfied investor will disappear. This cannot comfortably be squared with Justice Scalia’s account of the policies underlying the FAA.

³⁶⁵ See, e.g., Leslie Bailey & Paul Bland, *How Courts Can and Should Limit AT&T Mobility v. Concepcion*, available at <http://www.publicjustice.net/Resources/How-Courts-Can-and-Should-Limit-ATT-v-Concepcion.aspx>.

³⁶⁶ See [Discover Bank, 113 P.3d at 1110](#): While “[w]e do not hold that all class action waivers are necessarily unconscionable,”

- “when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and
- when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money,”

then “the waiver in practice becomes in practice the exemption of the party ‘from responsibility for its own fraud’” in violation of California law.

Justice Scalia pointed out that any supposed limitations in this already expansive formula were in fact quite meaningless, the former being “toothless and malleable” (“the Ninth Circuit has held that damages of \$4,000 are sufficiently small”), and the latter having “no limiting effect,” since to allow a class action to proceed apparently “all that is required is an allegation.” [Concepcion, 131 S. Ct. at 1750](#).

³⁶⁷ As we have seen, the lower courts in *Conception* itself relied not so much on the adverse effect of the waiver on the individual plaintiff -- for it could be assumed that aggrieved consumers who went to the trouble of actually making a claim would be assured relief -- as on an “overarching policy concern of deterring corporate wrongdoing.” See generally the discussion at note 246 *supra*. A related line of California cases elided any concerns of “unconscionability” altogether -- to the point of instructing trial judges that the validity of a class-action waiver should turn solely on their considered judgment as to whether “class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration”: Indeed “the kind of inquiry a trial court must make is similar to the one it already makes to determine whether class actions are appropriate”; see [Gentry, 165 P.3d at 567-68](#) (statutory claim for overtime pay; “class actions may be needed to assure the effective enforcement of statutory policies even though some claims are large enough to provide an incentive for individual action”). Some California courts eerily seem to believe that striking down class waivers on this ground should still permit them to avoid the reach of *Conception*, see [Plows v. Rockwell Collins, Inc., 2011 WL 3501872 \(CD. Cal. Aug. 9, 2011\)](#) (inferring from recent cases that state courts will find that the *Gentry* rule is not “preempted by the FAA”); cf. [Arguelles-Romero v. Superior Court, 109 Cal. Rptr. 3d 289 \(Cal. App. 2010\)](#) (“*Discover Bank* is a rule about unconscionability, [whereas] the rule set forth in *Gentry* is concerned with the effect of a class action waiver on unwaivable rights regardless of unconscionability”). But we can at least agree with Justice Thomas -- whose astonishingly and yet characteristically non-functional concurrence in *Conception* otherwise

deserves no attention -- that this in fact makes things *worse, not better*. The *Gentry* line takes us down a path that leads very far from the law of Contracts. See note 197 *supra*; [Conception](#), 131 S. Ct. at 1754, 1756 (Thomas J., concurring) (§ 2 as limited by § 4 permits challenges to the “making” -- that is, the “formation” -- of contracts, but not to their “validity or enforceability”; *Discover Bank*, representing a “refusal to enforce a contract for public-policy reasons,” falls into the latter category).

³⁶⁸ FINRA CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES, R. 12204 (any “class action claims” [sic] or claims that are “part of a class action” “may not be arbitrated under the Code”), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096.

³⁶⁹ See also Drahozal & Rutledge, *supra* note 88, at 1166-67.

³⁷⁰ Cf. Stipanowich, *supra* note 129, at 380 (“In the wake of *Conception*, one wonders what if anything is left of the doctrine of unconscionability in the realm of arbitration agreements”); see also *id.* at text accompanying note 265 (“Scalia’s rationale aims straight at the doctrine of unconscionability”).

³⁷¹ See text accompanying notes 204-05, 236-37, *supra*. For cases engaging in an individualized fact-intensive inquiry into the claimant’s means, see [Scovill v. WSYX/ABC](#), 425 F.3d 1012, 1021 (6th Cir. 2005) (although the plaintiff/employee had made nearly \$100,000 a year, he had “recently lost his job, his future income is uncertain as he just began a business, he has children to support, and it does not appear as though he amassed a great savings to use in arbitration proceedings”); [Openshaw](#), 731 F. Supp. 2d at 997 (“after spending his life savings becoming a FedEx contractor,” the plaintiff “is not currently in a position to be spending ... \$12,700 on [up-front] arbitration fees,” which “is a significant disincentive and obstacle to filing a claim for wrongful termination”). Cf. [Cooper v. MRM Investment Co.](#), 367 F.3d 493, 512 (6th Cir. 2004) (courts will “regularly find arbitration costs too high to permit enforcement of a lower- or middle-income employee’s duty to arbitrate,” while finding that “high-level managerial employees and others with substantial means can afford the costs of arbitration”). But note this critical distinction: Any argument to the effect that the “costs” of individual proceedings make class-wide litigation necessary must be excluded; such a claim seems to have no possible purchase here; cf. [In re American Express Merchants’ Litigation](#), 634 F.3d 187, 197-98 (2d Cir. 2011) (pre-*Conception*; class-action waiver unenforceable because “the cost of plaintiffs’ individually arbitrating their dispute with Amex would be prohibitive, effectively depriving [them] of the statutory protections of the antitrust laws”); Nagareda, *supra* note 174, at 49 (pre-*Conception*; “credible, unopposed evidence that a class waiver will operate as an exculpatory clause with regard to the particular kinds of claims at issue discharges the burden placed by [Randolph, *supra* note 238] on the opponent of arbitration of showing the likelihood of incurring ‘prohibitive’ costs”). For here the contrary narrative is clear and compelling; the “costs” blithely invoked are not (as above) those peculiar to the arbitral forum and which tend to make it unduly burdensome -- but are rather the inevitable consequence of the simple fact that the amount in controversy is trivial. And that is true almost by definition in many if not most cases where aggregate litigation is sought; cf. note 236 *supra*.

See [Conception](#), 131 S. Ct. at 1753 (perhaps “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system,” “but States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons”); see also [In re Apple & AT&T iPad Unlimited Data Plan Litigation](#), 2011 WL 2886407 at *3 (N.D. Cal. July 19, 2011) (“plaintiffs’ contention that their modest claims simply do not provide sufficient motivation for an aggrieved customer to seek redress on an individual basis is the very argument that was struck down in *Conception*”); [Kaltwasser v. AT&T Mobility LLC](#), 2011 WL 4381748 at *5 (N.D. Cal. Sept. 20, 2011) (“the notion that arbitration must never prevent a plaintiff from vindicating a claim is inconsistent with *Conception*”).

On the other hand, we must recognize -- and any law student should be aware -- that a whole world of alternative common-law devices remains which can be summoned up at will: Many of them in fact are doctrines for which “unconscionability” was designed as a surrogate in the first place. (The comment to [UCC § 2-302](#) reminds us that the primary contribution of “unconscionability” is only this -- that it “makes it possible” for a court, which chooses to do so, “to police *explicitly* against the contract or terms which the court finds to be unconscionable instead of attempting to achieve the result by an adverse construction of language [or] by manipulation of the rules of offer and acceptance.”) For example, see [NAACP of Camden County East v. Foulke Management Corp.](#), 2011 WL 3273896 at *1 (N.J. Super. Aug. 2, 2011) (class waiver provisions were “too confusing, too vague, and too inconsistent to be enforced” as contracts -- due to a lack of “mutual assent”; supposedly this is not the “unconscionability” route barred by *Conception*, but instead is grounded in “basic principles of contract formation”).

³⁷² See Justice Scalia’s discussion in [Conception](#), 131 S. Ct. at 1747.

[373](#) See note 203 *supra*.

[374](#) See Aragaki, *supra* note 339, at 1242 (when state statutes prohibit contractual provisions imposing an out-of-state forum, the existing “paradigm” ensures that challenges to such statutes will enjoy “near certain success,” for they “are almost universally perceived as hostile to arbitration because they apply only to one type of provision”); Born, *supra* note 322 (“a state-law requirement that all arbitrations be conducted only in a local, in-state seat” “offends” the FAA “because it forces parties to conduct an arbitration in a manner that they have not agreed”); [Bradley v. Harris Research, Inc., 275 F.3d 884 \(9th Cir. 2001\)](#) (statute rendered “void” a “provision in a franchise agreement restricting venue to a forum outside this state”; held, statute “is not a generally applicable contract defense that applies to any contract” and is thus preempted); Drahozal, *supra* note 322, at 421 (“most courts dealing with such statutes have held the same” as *Bradley*).

I put aside any serious consideration of [Keystone, Inc. v. Triad Systems Corp., 971 P.2d 1240 \(Mont. 1998\)](#). Here a contractual provision calling for arbitration to be held in San Francisco was, pursuant to a state statute, held to be invalid; arbitration was ordered to take place in Montana. The court found that the FAA was no obstacle since the statute in question did not after all “nullify” -- but rather “preserves” -- the “obligation to arbitrate”; the offending provision was severed without explanation, either by fiat or with the aid of a conclusive presumption. Now, that

- the entire preemption inquiry should turn on a court’s willingness to wield the tool of “severability” -- and without the usual nod in the direction of party intention,
- and that arbitration “somewhere” -- i.e. in Montana -- is thought to be enough to satisfy the federal policy fostering private autonomy,

are all notions that are foolish in the extreme. A party who has managed to obtain an arbitration clause with a seat in Geneva (Wisconsin if not Switzerland) -- but who finds both that any award in his favor is unenforceable on public policy grounds in Montana, and that he is obligated at the same time to engage in a proceeding in Butte -- is not likely to conclude that his agreement is being honored “according to its terms” as required by the federal statute. The FAA does indeed “address where the arbitration proceeding is to take place,” at least where the parties or their chosen institution has said something on the subject; *cf.* Drahozal, *supra* note 322, at 421.

[375](#) See note 202 *supra*.

[376](#) Bruhl, *supra* note 180, at 1469.

[377](#) See [Conception, 131 S. Ct. at 1753](#); see [id. at 1752](#) -- where Justice Scalia finds it “[hard] to believe that Congress would have intended to allow state courts to force” a decision by contracting parties to “bet the company with no effective means of review.” (As I have already noted, this seems an unfair characterization of California law, which is no longer in any position to impose class-wide arbitration on an unwilling party; see text accompanying note 308 *supra*).

[378](#) “M. tient à ses idées. Il aurait de la suite dans l’esprit, s’il avait de l’esprit.” NICOLAS CHAMFORT, MAXIMES ET PENSÉES, CARACTÈRES ET ANECDOTES 223 (10/18 ed. 1963).

On Justice Thomas and preemption by the FAA of state law, see note 32 *supra*; see also [Allied-Bruce Terminix Companies, Inc., 513 U.S. at 291](#) (“the text of the statute ... makes clear that § 2 was not meant as a statement of substantive law binding on the States”) (Thomas, J., dissenting).

[379](#) Of course the phenomenon of the purely local state-law state-court class action, one not removable to federal court, has increasingly been marginalized; see Class Action Fairness Act of 2005, [28 U.S.C. §§ 1332\(d\)\(2\)](#) (original federal jurisdiction where there is minimal diversity and more than \$5 million in controversy), 1453(b) (any defendant may remove), 1332(d)(4) (but no federal jurisdiction where more than 2/3 of class members are citizens of the forum state). See also Nagareda, *supra* note 174, at 47 (“as a practical matter today, the kinds of proposed class actions likely to elicit defense motions to compel one-on-one arbitration will stand to be filed in (or quickly removed to) federal court”).

In two cases immediately following *Concepcion*, the Supreme Court took cert and vacated “for further consideration” state cases that on grounds of varying legitimacy had invalidated class-action waivers; see [Herron v. Century BMW, 693 S.E.2d 394 \(S.C. 2010\)](#) (terms of the agreement “are neither oppressive nor one-sided,” but “the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violation of the Dealers’ Act”), *judgment vacated and case remanded*, [131 S. Ct. 2872 \(2011\)](#); [Brewer v. Missouri Title Loans, Inc., 323 S.W.3d 18 \(Mo. 2010\)](#) (“substantive unconscionability” because “it was unlikely that a consumer could retain counsel to pursue individual claims”), *judgment vacated and case remanded*, [131 S. Ct. 2875 \(2011\)](#). In neither case had the federalism issue been briefed, and of course there was no opinion or indication of how, if at

all, the Court was divided.

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An analogous case is *Mastrobuono*, *supra* note 146. Here the Court, reversing lower federal courts, held that the parties' New York choice-of-law clause did not capture the state's rule prohibiting arbitral awards of punitive damages: Certainly "in the absence of contractual intent to the contrary, the FAA would pre-empt" the New York rule hostile to arbitral power -- and no such intent could be found after giving "due regard" to "the federal policy favoring arbitration." Justice Thomas dissented, claiming that at bottom *Mastrobuono* really amounted to little more than a situation "much like" *Erie* -- in which a federal court was expected to be transparent in applying "a state rule of decision to a case when sitting in diversity" -- so that *Mastrobuono* would represent "only the understanding of a single federal court regarding the requirements imposed by state law." But while New York courts did enter a brief period of wishful thinking along those lines, it didn't take long for them to acquiesce in the inevitable conclusion that *Mastrobuono*'s exercise in contract construction was binding on them as well. *E.g.*, [Americorp Securities, Inc. v. Sager](#), 656 N.Y.S.2d 762 (A.D. 1997) (although New York law "prohibited arbitrators from awarding punitive damages," the FAA has a "preemptive effect" on "inconsistent state rules"); [D212 Investment Corp. v. Kaplan](#), 2007 WL 2363233 at *11 (N.Y. Sup. Ct. July 18, 2007) ("an arbitration proceeding governed by the [FAA] preempts the [New York] rule, even where there is a New York choice-of-law clause in the arbitration agreement"); *see generally* Rau, "Waiver," *supra* note 22, at 256-61 ("it seems abundantly clear that any such territorial interest of the forum state must yield to federal policy in an area of federal competence"). At least in *Mastrobuono* Justice Thomas was able to perceive that regulation of the arbitral process should not vary dependent on the happenstance of federal jurisdiction; his concurrence in *Concepcion* calls into question his adherence even to that marginally sensible approach.

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Perhaps Justice Thomas' ultimate acquiescence in *Southland* could be "bought" at the price of the majority's assent to his eccentric reading of § 2 -- under which "revocation" of an arbitration agreement would be limited only to a small "subset" of contract defenses. *See Concepcion*, 131 S. Ct. at 1754; *see generally* the discussion at note 197 *supra*. California's invalidation of certain offending provisions as "unconscionable" rested to a large extent on framing them as "exculpatory." *See* note 367 *supra*; [Discover Bank](#), 113 P.3d at 1108 ("class action waivers found in [consumer] contracts may also be substantively unconscionable inasmuch as they operate effectively as exculpatory contract clauses that are contrary to public policy"). While the majority does not explicitly touch on this, it does seem to have been at the center of Justice Thomas' concerns. While in *Discover Bank* "exculpatory" could mean simply that the defendant was acting in such a way as to "insulate [itself] from liability that otherwise would be imposed under California law," in *Concepcion* it seemed to mean rather that the defendant was acting in such a way as to prevent optimal deterrence of his misconduct, *see Discover Bank*, 113 P.3d at 1109; Nagareda, *supra* note 174, at 43-44, 48. Under either formulation, to the extent such challenges are deemed not to implicate the "making" of the agreement -- whatever that means -- there can then be only minimal prospects of state-law review for fairness; the consequence is presumably that courts must "grit their teeth" and treat arbitration clauses containing such provisions as the "'little darlings' Congress says they are," relying entirely on the arbitral tribunal to do the necessary monitoring. *See* Friedman, *supra* note 197, at 2067; note 331 *supra*. Might this plausibly appeal to Justice Thomas as a reasonable tradeoff?